No. 11403

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant.

vs.

WILLIAM RAY OLSEN, Claimant of One Article of device labeled in part "Spectro-Chrome",
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon

Rotary Colorprint, 870 Brannan Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

HENRY L. HESS,
United States Attorney,

J. ROBERT PATTERSON,
Assistant United States Attorney,
United States Court House,
Portland, Oregon,
for Appellant.

BARNETT H. GOLDSTEIN,
Failing Building,
Portland, Oregon,
for Appellee.

In the District Court of the United States
for the District of Oregon

July Term, A. D., 1945

No. Civ. 2855

UNITED STATES OF AMERICA,

v.

One article of device labeled in part "SPECTRO-CHROME" and accompanying labeling.

LIBEL OF INFORMATION

F. D. C. No. 16781

To the Honorable Judges of the United States District Court for the District of Oregon.

Now comes the United States of America, by Carl C. Donaugh, United States Attorney for the District of Oregon, and shows to the Court:

1. That this libel is filed by the United States of America and prays seizure and condemnation of a certain article of device, as hereinafter set forth in accordance with the Federal Food, Drug, and Cosmetic Act (21 U. S. C. 301 et seq.).

2. That Dinshal Spectro - Chrome Institute shipped in interstate commerce from Newfield, New Jersey, to Portland, Oregon, via Railway Express Agency, on or about June 14, 1945, an article labeled in part "Spectro-Chrome," consisting essentially

of a cabinet equipped with an electric light bulb, an electric fan, a container for water, glass condenser lenses and glass slides each of a different color, the cabinet having an opening in the front through which light from the bulb may shine through the glass slides, which article is intended for use in the cure, mitigation, treatment and prevention of disease and to affect the structure and functions of the body of man, together with an assortment of written, printed and graphic matter entitled in part "Spectro-Chrome Home Guide," "Favorscope for 1945," "Rational Food of Man," "Key to Radiant Health," "Request for Enrollment as Benefit Student," "Auxiliary Benefit Notice—Make Your Own Independent Income as Our Introducer," "Spectro-Chrome General Advice Chart for the Service of Mankind—Free Guidance Request," "Certificate of Benefit Studentship," "Spectro-Chrome — December 1941 — Scarlet," "Spectro-Chrome March 1945—Yellow," which relate to said article, and which contained statements and references to the curative and therapeutic value of said article in the cure, mitigation, treatment and prevention of disease and for the use of said article in affecting the structure and functions of the body of man and directions for the use of said article in the cure, mitigation, treatment and prevention of diseases, disorders, conditions, symptoms and in affecting the structure and functions of the body of man.

3. That the aforesaid article is a device within the meaning of 21 U. S. C. 321(h) and when in-

troduced into and while in interstate commerce was misbranded within the meaning of 21 U. S. C. 352(a) in that the following statement which appears upon a label plate attached to the device, namely, "Spectro-Chrome Metry Measurement and Restoration of the Human [1*] Radio-Active and Radio-Emanative Equilibrium (Normalation of Imbalance) by Attuned Color Waves" is false and misleading in this, that said statement represents and suggests that said article of device is capable of measuring and restoring human-radio-active and radio-emanative equilibrium (normalation of imbalance) by attuned color waves, whereas, said article of device is incapable of measuring and restoring human radio-active and radio-emanative equilibrium (Normalation of Imbalance) by attuned color waves since the article is incapable of performing any function of measurement, there is in the human system no radio-active or radio-emanative equilibrium, and the use of color waves will have no effect on Normalation of Imbalance.

4. That said article of device when introduced into and while in interstate commerce, as aforesaid, was further misbranded within the meaning of 21 U. S. C. 352(a) in that the statements and references which appear in the labeling of said article of device, namely, in the printed and graphic matter shipped with said article entitled in part "Spectro-Chrome Home Guide," "Favorscope for 1945", "Rational Food of Man," "Key to Radiant

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* Page numbering appearing at foot of page of original certified Transcript of Record.

Health," "Request for Enrollment as Benefit Student," "Auxiliary Benefit Notice—Make Your Own Independent Income as Our Introducer," "Spectro-Chrome General Advice Chart for the Service of Mankind—Free Guidance Request," "Certificate of Benefit Studentship," "Spectro-Chrome — December 1941 — Scarlet," "Spectro-Chrome—March 1945—Yellow", regarding the claims for said device when used as directed in affecting the structure or any function of the body of man and regarding the curative and therapeutic claims of value for said device when used as directed in the cure, mitigation, treatment and prevention of diseases of man, namely, all disorders of the heart, lungs, skin, nutrition, mentality, emotions, inflamation with pain, with swelling, with fever or with redness, disorders of the blood, genitals, females, children, teeth, with growths or tumors, motor system, sensory system, motion paralysis, sense paralysis, blindness, deafness, gonorrhea, syphilis, ulcers, chancres, smallpox, scarlet fever, diptheria, whooping cough, chicken pox, measles, German measles, mumps, fallen womb, habitual tendency to miscarriage, impending miscarriage, during pregnancy, during childbirth, sterility, burns of any degree, sunstroke, diabetes, sex frigidity, excessive sex craving, accident, gastritis, appendicitis, meningitis, rupture, consumption or tuberculosis, boils, abscesses, carbuncles, furuncles, facial sag, leaky heart, hiccoughs, arthritis, rheumatism, cataract, x-ray and radium destruction, the control of cancerous growths, as a liver energizer, hemoglobin

builder, respiratory stimulant, parathyroid depressant, thyroid energizer, anti-spasmodic, galactagogue, antirachitic, emetic, stomachic, lung builder, motor stimulant, alimentary tract energizer, lymphatic activator, splenic depressant, digestant, cathartic, cholagogue, anthelmintic, nerve builder, cerebral stimulant, thymus activator, antacid, chronic alterative, anti-scorbutic laxative, expectorant, bone builder, pituitary stimulant, disinfectant, purificator, antiseptic, germicide, bactericide, detergent, muscle and tissue builder, cerebral depressant, acute alterative, tonic, skin builder, antipruritic, diaphoretic, febrifuge, counterirritant, anodyne, demulcent, vitality builder, parathyroid stimulant, thyroid depressant, respiratory depressant, astringent, sedative, pain reliever, hemostatic, inspissator, phagocyte builder, splenic stimulant, cardiac depressant, lymphatic depressant, leucocyte builder, venous stimulant, renal depressant, antimalarial, vasodilator, anaphrodisiac, narcotic, antipyretic, analgesic, sex builder in [2] supernormal, suprarenal stimulant, cardiac energizer, diuretic, emotional equilibrator, auric builder, arterial stimulant, renal energizer, genital excitant, aphrodisiac, emmenagogue, vasoconstrictor, ecbolic, sex builder in subnormal and other diseases, conditions, symptoms and disorders are false and misleading in this, that said statements and references represent and suggest and create in the mind of the reader thereof the impression that the said article of device when used in accordance with the directions for use appearing in the aforesaid labeling is effective in the

cure, mitigation, treatment and prevention of the diseases, disorders, conditions and symptoms stated and implied and in affecting the structure and functions of the body of man, and when said device is so used constitutes a safe and appropriate treatment therefor, whereas, the said article of device when used in accordance with said directions for use or when used in any manner whatsoever is of no value in the cure, mitigation, treatment or prevention of any disease, disorder, condition, symptom or in affecting the structure of any functions of the body of man and when so used as directed may delay appropriate treatment of serious diseases, resulting in serious or permanent injury or death to the user.

5. That the aforesaid article of device is in the possession of William R. Olsen, 7425 Southeast Insley Street, Portland, Oregon, or elsewhere within the jurisdiction of this Court.

6. That by reason of the foregoing, the aforesaid article is held illegally within the jurisdiction of this Court, and is liable to seizure and condemnation pursuant to the provisions of said Act, 21 U.S.C. 334.

Wherefore, libellant prays that process in due form of law according to the course of this Court in cases of admiralty jurisdiction issue against the aforesaid article; that all persons having any interest therein be cited to appear herein and answer the aforesaid premises; that this Court decree the

condemnation of the aforesaid article and grant libelant the costs of this proceeding against the claimant of the aforesaid article; that the aforesaid article be disposed of as this Court may direct pursuant to the provisions of said Act; and that libellant have such other and further relief as the case may require.

Dated: Portland, Oregon, July 26th, 1945.

UNITED STATES OF AMERICA,

By CARL C. DONAUGH,
U. S. Attorney,

J. ROBERT PATTERSON,
Assistant U. S. Attorney. [3]

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, being first duly sworn, depose and say: That I am a duly appointed, qualified and acting Assistant United States Attorney for the District of Oregon; that the facts set forth in the foregoing Libel Condemnation are true as I verily believe; that I make this affidavit of verification for the reason that I am authorized to bring this libel by the Honorable Attorney General of the United States, and that I have prepared the foregoing libel and make the allegations therein contained upon information furnished me by the General Counsel of the Federal Security Agency.

J. ROBERT PATTERSON.

Subscribed and sworn to before me this 26th day of July, 1945.

LOWELL MUNDORFF,
Clerk.

By VERNE O. BISHOP,
Deputy.

[Endorsed]: Filed July 26, 1945. [4]

[Title of Cause.]

ORDER ALLOWING LIBEL TO BE FILED

July 26, 1945.

Now at this day upon motion of Mr. J. Robert Patterson, Assistant United States Attorney.

It Is Ordered that he be and is hereby allowed to file a libel herein. [5]

[Title of District Court and Cause.]

ORDER

A libel having been filed in the above-entitled cause, on the 26th day of July, 1945, and being fully advised of the law and the facts, and it appearing therefrom to be a proper cause, Now, Therefore, It Is Hereby Considered and Ordered by the Court that process in due form of law issue against the property described in said libel, and that all persons interested in said described property be

cited to file answer to said libel, setting forth their interest in or claim to said property libeled, if any they have, with the Clerk of this Court, in the City of Portland, in the District of Oregon, on or before the 3rd day of September, 1945, which said day is hereby fixed as the return date thereof;

It Is Further Ordered That notice be given to all persons interested in said property, by causing the substance of said libel, with the order of court setting the time and place appointed for the trial and hearing of said libel, to be published three times at least fourteen days prior to the said 3rd day of September, 1945, in the "Daily Journal of Commerce," a newspaper of general circulation at Portland, Oregon, and near the place where said property was seized.

Dated at Portland, Oregon, this 26th day of July, 1945.

/s/ JAMES ALGER FEE,
District Judge.

[Endorsed]: Filed July 26, 1945. [6]

United States District Court, District of Oregon

WARRANTS OF SEIZURE AND MONITION

The President of the United States of America
To the Marshal of the District of Oregon—
Greeting:

Whereas, on the 26th day of July, A. D. 1945, a Libel of Information was filed in the United

States District Court for said District of Oregon by J. Robert Patterson, Assistant United States attorney for said District, on behalf of the United States against One article of device labeled in part "Spectro-Chrome" and accompanying labeling, and praying that all persons interested in said goods, wares, and merchandise may be cited in general and special, to answer the premises; and due proceedings being had, that the said goods, wares, and merchandise may, for the causes in said Information mentioned, be condemned as forfeited to the use of the United States.

You Are Therefore Hereby Commanded To attach the said goods, wares, and merchandise, and to detain the same in your custody until further order of said Court respecting the same; and to give notice of all persons claiming the same, or knowing or having anything to say why the same should not be condemned as forfeited to the use of the United States, pursuant to the prayer of said Information, that they be and appear before the said Court, at the city of Portland on the 3rd day of September, 1945 next, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf. And what you have done in the premises, do you then and there make return thereof, together with this writ.

Witness the Honorable James Alger Fee and the Honorable Claude McColloch, United States Dis-

trict Judges at Portland, Oregon, this 27th day of July, A. D. 1945.

[Seal] LOWELL MUNDORFF,
Clerk,

By /s/ F. L. BUCK,
Chief Deputy Clerk.

[Endorsed]: Filed July 31, 1945. [7]

United States Marshal's Return

District of Oregon—ss.

Received the within writ the 28th day of July, 1945, and executed same. I hereby certify and return that I served the annexed Warrant of Seizure and Monition on the therein named One article of device labeled in part "Spectro-Chrome"; and accompanying labeling, at 7425 S. E. Isley St., Portland, Oregon, at 11:15 a.m. this 28th day of July, 1945 by Seizing and removing the said "Spectro-Chrome" etc, by handing to and leaving a true and correct copy thereof with William R. Olsen, and stored the same in the U. S. Marshal's Office in the United States Court House.

Dated at Portland, Oregon, this 28th day of July, 1945.

JACK R. CAUFIELD,
U. S. Marshal,

By /s/ W. H. RICKARD,
Deputy Marshal.

[Title of Cause.]

RETURN ON SERVICE OF WRIT

United States of America,
District of Oregon—ss.

I hereby certify and return that I posted the annexed Three (3) Notices Warrant of Seizure and Monition on the therein-named "Spectro-Chrome" etc, by posting one on the bulletin board in the U. S. Post Office at Glisan & Brody St., one on the bulletin board in the Multnomah County Court House, and one on the bulletin board in the United States Court House, by posting to and leaving a true and correct copy thereof on the aforesaid bulletin boards personally at Portland, in said District on the 28th day of July, 1945.

JACK R. CAUFIELD,
U. S. Marshal,

By /s/ W. H. RICKARD,
Deputy.

[Title of Cause.]

AFFIDAVIT OF PUBLICATION

State of Oregon,
County of Multnomah—ss.

I. W. H. Caplan, being first duly sworn, depose and say that I am the Manager of The Daily Journal of Commerce, a newspaper of general circulation as defined by Section 1-610 Oregon Compiled Laws Annotated, printed and published at Port-

land in the aforesaid County and State, that Notice (Spectro-Chrome) a printed copy of which is hereto annexed and marked "Exhibit A," was published in the entire issue of said newspaper for three successive and consecutive days in the following issues: Aug. 1st, 1945, Aug. 2nd, 1945, Aug. 3rd, 1945.

/s/ W. H. CAPLAN.

Subscribed and sworn to before me this 3rd day of August, 1945.

[Seal] /s/ EVELYNNE HANSON,
Notary Public for Oregon.

(My Commission expires March 1, 1945.)

"EXHIBIT A"

Notice

In the District Court of the United States for the District of Oregon, United States of America v. One Article of Device labeled in part "Spectro-Chrome" and accompanying labeling. Public Notice Is Hereby Given that on the 28th day of July, 1945, 1 Article of Device labeled in part "Spectro-Chrome", together with accompanying labeling, was arrested and taken into the possession of and now is in the possession of the United States Marshal for the District of Oregon, pursuant to a warrant and process duly issued by the Clerk of the United States District Court for the District of Oregon, in a suit for condemnation and forfeiture entitled United States of America, Libelant v. One Article of Device labeled in part "Spectro-Chrome" and

accompanying labeling, brought under the provisions of Section 334, Title 21, U.S.C.A., wherein it is sought to have the above described article of device condemned and forfeited for the following reasons: That on or about the 14th day of June, 1945, the said article of device was shipped in interestate commerce from Newfield, New Jersey, to Portland, Oregon; that the said article of device is misbranded within the purview of Title 21, United States Code, Section 352(a), in that the statements which appear in the labeling of said article of device are false and misleading; that all persons claiming any right, title or interest in and to the said article of device are hereby notified to appear on or before the 3rd day of September, 1945, in the Federal Court at Portland, Oregon, to show cause, if any there be, why the same should not be decreed against and forefeited to the United States as a misbranded article of device.

JACK R. CAUFIELD,
U. S. Marshal,

CARL C. DONAUGH,
U. S. Attorney for the District of Oregon,

J. ROBERT PATTERSON,
Assistant U. S. Attorney.

Published August 1, 2, 3, 1945.

4774-3T

[Endorsed]: Filed Aug. 17, 1945. [10]

[Title of District Court and Cause.]

APPEARANCE AND ANSWER OF CLAIMANT TO LIBEL OF INFORMATION

To the Honorable Judges of the United States District Court for the District of Oregon.

Now comes William Ray Olsen, a resident and inhabitant of the City of Portland, County of Multnomah, State of Oregon, and residing at 7425 S. E. Insley Street, in said City and State, as claimant of the above described device labeled "Spectro-Chrome", and files his appearance in the above entitled proceeding and alleges as his claim and answer thereto:

I.

That he is the sole owner of and entitled to the exclusive possession of the aforesaid device labeled "Spectro-Chrome", which was unlawfully and forcibly seized and taken by the libelant from the possession of said claimant, over his protests and against his consent, while said personal property was in his home at 7425 S. E. Insley Street, Portland, Oregon, and which was not then and there subject to the jurisdiction or processes of this court.

II.

Admits that the aforesaid libel was filed by the United States of America praying seizure and condemnation of said device, as alleged in paragraph I of said libel, and further admits that the aforesaid device at the time of the seizure was in the possession of the claimant at 7425 S. E. Insley

Street, Portland, Oregon, as alleged in Paragraph 5 of said libel. [11]

III.

Save and except as hereinbefore specifically pleaded and admitted, the answering claimant herein denies each and every other allegation contained in Paragraphs I to VI inclusive, of the libel filed herein.

Wherefore the said claimant demands judgment that the libel filed herein be dismissed and that a decree be entered directing the return of said device labeled "Spectro-Chrome" to the said claimant, and for such other and further relief as the nature of the case may require, together with his costs and disbursements incurred herein.

/s/ BARNETT H. GOLDSTEIN,
Attorney for Claimant.

State of Oregon,
County of Multnomah—ss.

I, William Ray Olsen being first duly sworn, say that I am the Claimant in the within entitled Proceeding and that the foregoing Answer is true as I verily believe.

/s/ WILLIAM RAY OLSEN.

Subscribed and sworn to before me this 30th day of August, 1945.

[Seal] /s/ BARNETT H. GOLDSTEIN,
Notary Public for Oregon.

My Commission Expires November 3, 1947.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof. as required by law, is hereby accepted in Multnomah County, Oregon, on this 31 day of August, 1945.

/s/ J. ROBERT PATTERSON,
Attorney for Libelant.

[Endorsed]: Filed Aug. 31, 1945. [12]

[Title of District Court and Cause.]

MOTION

Comes now Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and moves the Court for an order directing the United States Marshal to detach from the Spectro-Chrome device which was heretofore seized pursuant to process issued in the above-entitled case, the sealed slide-containing semaphore, and to deliver it to a representative of the Food and Drug Administration in order that a scientific examination may be made of these colored slides, the slides being a component and principal part of the Spectro-Chrome device.

Dated at Portland, Oregon, this 20th day of February, 1946.

HENRY L. HESS,
United States Attorney for the District of Oregon,
J. ROBERT PATTERSON,
Assistant United States Attorney.

United States of America,
District of Oregon—ss.

Due and legal service of the within Motion is hereby accepted within the State and District of Oregon, on the 20 day of February, 1946, by receiving a copy thereof duly certified to as true and correct copy of the original by J. Robert Patterson, Assistant United States Attorney for the District of Oregon.

/s/ BARNETT H. GOLDSTEIN,
Attorney for Claimant.

[Endorsed]: Filed Feb. 20, 1946. [13]

[Title of District Court and Cause.]

MOTION FOR AN ORDER DIRECTING CLAIMANT TO FILE STIPULATION FOR COSTS.

Now comes the United States of America, Libelant, by Henry L. Hess, United States Attorney for the District of Oregon, by J. Robert Patterson, Assistant United States Attorney, and moves this court to direct the claimant in this action to give a stipulation for costs for the following reasons:

1. That a proceeding similar to this action was tried in the United States District Court for the Eastern District of New York, being entitled

"United States of America, Libelant, vs. One article of device labeled in part 'Spectro-Chrome' and accompanying literature," Docket No. 894, which proceeding began on May 14, 1945, and was concluded on June 26, 1945;

2. That in the foregoing proceeding in the Eastern District of New York the costs and expenses were taxed as follows:

Statutory Costs	$ 20.00
Fee, Filing Libel	5.00
Fee, Entry Decree	5.00
United States Marshal's Fee	15.65
Witnesses' Fees	2486.20
Taxed at	$2531.85

3. That it is the firm belief of your movant that the length of time required to try this action and the expenses incident thereto will approximate that of the proceeding previously tried in the Eastern District of New York aforesaid;

4. That pursuant to Rule 24 of the Admiralty Rules this court may direct the claimant herein to give a stipulation or an approved [14] corporate surety in such sum as the court shall direct to pay all costs and expenses which may be taxed against the claimant by the final decree of this court in this proceeding;

Wherefore, it is moved that the claimant herein be directed by an order of this court to give a stipulation or approved corporate surety in such

an amount as this court may determine and direct at the hearing on this motion.

HENRY L. HESS,

United States Attorney for the District of Oregon,

/s/ J. ROBERT PATTERSON,

Assistant United States Attorney. [15]

[Title of District Court and Cause.]

CERTIFICATE OF SERVICE BY MAIL

United States of America,
District of Oregon—ss.

I. J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Motion for an Order Directing Claimant to File Stipulation for Costs on the Claimant herein, by depositing in the United States Post Office at Portland, Oregon, on the 4th day of March, 1946, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Mr. Barnett

H. Goldstein, Attorney at Law, Failing Building, Portland, Oregon, Attorney for Claimant.

/s/ J. ROBERT PATTERSON,
Assistant U. S. Attorney.

Subscribed and sworn to before me this 4th day of March, 1946.

/s/ R. DeMOTT,
Deputy Clerk.

[Endorsed]: Filed Mar. 4, 1946. [16]

[Title of Cause.]

ORDER RESERVING DECISION ON LIBELANT'S MOTION

March 11, 1946.

Libelant appearing by Mr. J. Robert Patterson, Assistant United States Attorney, claimant by Mr. Barnett H. Goldstein, of counsel. Whereupon this cause comes on to be heard upon the motion of the United States to detach slides and make a scientific examination and upon motion for an order directing claimant to file a stipulation for costs herein, and the Court having heard the arguments of counsel will take under advisement the order allowing motion of the United States to detach slides and make a scientific examination, and

It Is Ordered that the question of lawful seizure and the motion for an order directing claimant to

file stipulation for costs be and they are hereby reserved to the time of the pre-trial conference, and

It Is Further Ordered that claimant be and it is hereby allowed ten days from this date within which to file its brief on the question of lawful seizure; that libelant be and it is hereby allowed ten days thereafter within which to file its answer and that claimant be and it is hereby allowed five days thereafter within which to file its reply.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Because I was told that the Department of Justice was making this a test case for many similar cases throughout the country, I took some time before ruling, although it seemed plain to me at the outset that defendant's constitutional rights had been invaded.

Defendant has purchased a Spectro-Chrome for the use of himself and his mother. The prospectus promises many cures. A color, or a combination of colors, will cure this, another combination of color will cure that. The Government obtained a judgment that the machine was fraudulent in proceedings against the manufacturer and, because this machine was shipped in interstate commerce, the Government claims the right to take it from defendant, though he has bought and paid for it and is using it in his home. In fact, the Marshal

now has the machine in his possession, and this is a motion by the Government for permission to dismantle the machine for examination.

On what conceivable basis, under our Constitutional guaranties can the Government deny to an adult individual the right to believe in and seek to cure himself of physical ailments by any means he chooses, so long as the means chosen is not inherently dangerous or harmful? I know many people who wear charms, including some who carry the lowly potato, to keep diseases away, and I had always thought they had the right to do this. Incidentally, I have no [18] doubt that many get help in this manner.

I have not mentioned the special guaranties afforded by our law against intrusion into the home. This ground, I feel confident, could be shown to be sufficient to denounce the seizure in this case as unlawful.

Since writing what is above I have been advised that the Government is contemplating dismissing the case and returning the Spectro-Chrome to defendant's home. If that is done, it is likely that nothing more will need to be said.

The Government's motion is denied.

Dated this 4th day of April, 1946.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed April 4, 1946. [19]

[Title of Cause.]

ORDER DENYING LIBELANT'S MOTION TO DETACH SLIDES

April 4, 1946.

This cause was heard by the Court upon the motion of the United States of America to detach slides and make a scientific examination, and was argued by Mr. J. Robert Patterson, Assistant United States Attorney and Mr. Barnett H. Goldstein, of counsel for claimant. Upon consideration whereof the Court hands down its opinion and directs that the same be filed and,

It Is Ordered that said motion be and the same is hereby denied.

[Title of Cause.]

ORDER SETTING CAUSE FOR TRIAL

April 16, 1946.

Plaintiff appearing by Mr. J. Robert Patterson, Assistant United States Attorney, and the claimant, William Ray Olson by Mr. Barnett H. Goldstein, of counsel. Whereupon defendant moves the Court for dismissal of this cause, and the Court having heard the statements of counsel,

It Is Ordered that this cause be and it is hereby set for trial for Tuesday, May 21, 1946 at ten o'clock a.m. [21]

[Title of District Court and Cause.]

MOTION

1. To Quash Warrant
2. To Restore seized article to Claimant
3. To dismiss libel proceedings.

Comes now William R. Olsen, claimant herein, and respectfully moves this court for an order:

a. Quashing and setting aside warrant issued by the Clerk of this court for the seizure of article of device labeled "Spectro-Chrome".

b. Restore and return to claimant said article of device.

c. Dismiss the within libel proceedings.

This motion is made upon the following ground and for the following reasons:

1. Said warrant for the seizure of said property was issued without the showing of probable cause supported by oath or affirmation to the personal knowledge of affiant.

2. That the warrant for the seizure of said property was issued by the Clerk of this Court without any order or mandate of this court.

3. That the aforesaid property was seized and taken from the private home of said claimant over his protests and against his will in violation of his constitutional rights and without due process of law.

4. That the aforesaid seizure was made of an

article of device which was not then and there subject to the jurisdiction or [22] process of this court, in this, that said article was not then and there being transported in interstate commerce or was in the course of interstate commerce, but exclusively within the possession of claimant in his private home and was being used for his personal use and benefit with no intention of transporting or selling the same, and that said seizure was therefore not within the jurisdiction of this Court.

In support of said motion the affidavit of the said claimant, William R. Olsen, is attached hereto and made a part hereof.

/s/ BARNETT H. GOLDSTEIN,
Attorney for Claimant,

/s/ WILLIAM R. OLSEN,
Claimant. [23]

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, William R. Olsen, being first duly sworn depose and say: That I am the claimant in the above entitled proceeding; that I am over 21 years of age, am a citizen of the United States and at all times herein mentioned have been and still am a resident of the City of Portland, County of Multnomah, State of Oregon; that I reside and make

my home with my mother at 7425 S. Insley Street in said City, County and State.

That on, to-wit: on or about July 28, 1945, a Deputy United States Marshal, against my will and without my consent, forcibly entered my home at 7425 S. Insley Street, Portland, Oregon, and claiming to be acting under a warrant of seizure issued in the above entitled court and cause, forcibly seized and against my will and without my consent and over my protests, removed from my home and premises a certain device and apparatus, known and labeled as "Spectro-Chrome", which said device and apparatus was my own personal property, having been bought and paid for by me and was in my lawful possession in my home, and was being used therein by me and my mother for our own personal use and benefit.

That said warrant of seizure was unlawfully issued by the Clerk of this Court without any order or mandate of the court so to do and that by reason thereof said seizure by the said Deputy United States [24] Marshal of said property from my home was illegal, unlawful and in violation of my civil and constitutional rights.

That said device and apparatus at the time of said seizure was not used or intended to be used or sold in interstate commerce, and was not misbranded or intended to be misbranded, and was not used or intended to be used for any person or persons other than myself and my mother; that by reason of the foregoing the said device and apparatus was not

then and there subject to jurisdiction or process of this court.

That said device and apparatus so possessed by me and so kept in my home and on my premises was not and is not inherently dangerous or harmful to me or to my mother in any degree whatsoever, and same was being used by me and my mother for our own private use and purposes, to-wit: for the purpose of attempting to effect a treatment of certain nervous disorders, and that its use had been beneficial to us for the purposes for which it was intended.

That the wrongful seizure of my personal property from my own private home and premises is contrary to the constitution and laws of the United States and that the wrongful detention thereof by the Government without any lawful or constitutional authority therefor deprives me of my personal property without due process of law.

Wherefore I respectfully petition this court for the restoration to me of the said device and apparatus described as "Spectro-Chrome".

/s/ WILLIAM R. OLSEN.

Subscribed and sworn to before me this 23 day of April, 1946.

[Seal] /s/ BARNETT H. GOLDSTEIN,
Notary Public for Oregon.

My Commission expires: November 3, 1947.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law,

is hereby accepted in Multnomah County, Oregon, on this 23d day of April, 1946.

/s/ J. ROBERT PATTERSON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed April 23, 1946. [25]

[Title of District Court and Cause.]

MOTION

Comes now the United States of America, by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and it appearing from the records on file herein that William Ray Olsen has appeared in the above-entitled proceeding and has filed his appearance and answer alleging his claim to the above-mentioned device, and moves the Court for a Summary Judgment in favor of the United States of America.

Dated at Portland, Oregon, this 24th day of April, 1946.

HENRY L. HESS,
United States Attorney for
the District of Oregon,

/s/ J. ROBERT PATTERSON,
Assistant U. S. Attorney. [26]

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify

that I have made service of the foregoing Motion on the claimant herein, by depositing in the United States Post Office at Portland, Oregon, on the 24th day of April, 1946, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Mr. Barnett H. Goldstein, Attorney at Law, Failing Building, Portland, Oregon, attorney for claimant.

/s/ J. ROBERT PATTERSON,

Assistant U. S. Attorney.

[Endorsed]: Filed April 24, 1946. [27]

[Title of Cause.]

ORDER DIRECTING SEIZED ARTICLES TO BE RESTORED TO CLAIMANT

April 29, 1946.

Plaintiff appearing by Mr. J. Robert Patterson, Assistant United States Attorney, claimant, William R. Olson by Mr. Barnett H. Goldstein, of counsel. Whereupon this cause comes on to be heard upon claimants motion to quash the warrant of arrest herein; to restore the seized articles to said claimant and to dismiss the proceedings herein. The Court having heard the arguments of counsel,

It Is Ordered that the seized articles be returned to claimant. [28]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
District of Oregon—ss.

I, William Rickard, being first duly sworn, depose and say: That I am the Deputy United States Marshal for the District of Oregon and that on the 28th day of July, 1945, I was handed a warrant of seizure and asked that I execute it against an article of device labeled in part "Spectro-Chrome" and accompanying labeling. I was informed that the device was in the possession of William R. Olsen at 7425 S. E. Insley Street, City of Portland, State of Oregon. I thereupon called the Food and Drug Administration and asked that Mr. David J. Holliday, an inspector, accompany me to the Olsen residence for the purpose of identifying the machine and literature. At about 11 a.m. on this date we called at the residence at this address and upon knocking, the son, William R. Olsen, opened the door. Mr. Holliday introduced me to Mr. Olsen and told him that I was a deputy United States Marshal. The father, William Olsen, also came to the door about this time. I informed him that I had a warrant for the seizure of the machine, "Spectro-Chrome" and accompanying labeling. They invited us in and, after going into the living room, I began reading the warrant to them. They both interrupted me and a long conversation thereupon took place regarding the merits of the machine, "Spectro-Chrome", and my right to

seize the machine. Mrs. Olsen also came into the living room and was present during this conversation. I informed them that I was merely an officer of the court and that I had my orders to seize the [29] machine, that I had this warrant directing the seizure and that I was merely executing it and had no part in determining the merits of the device. I informed them that they had 30 days within which to redeem the machine and that they had best talk to their lawyer or to the United States Attorney. They told me that they would not permit me to take the machine from their residence and I then stated to them that if they would not give it up it would be necessary that I return to the Marshal's office to obtain additional papers and further instructions. After a long conversation, the father stated that I was only doing my duty and that in view of the fact that they would have 30 days within which to redeem the machine and also obtain the assistance of a lawyer, his son had better let me take the machine. The son then stated that we could take the machine. The son went into the bedroom and brought the "Spectro-Chrome" machine into the living room. Mr. Holliday asked for a screw-driver and the son went out of the room and came back with a screw-driver and handed it to Mr. Holliday. Mr. Holliday then removed two bolts from the stand; during this time the son held the large box to prevent it from falling. Mr. Holliday asked the son whether he still had the literature and the son thereupon went to a drawer, obtained the literature, and delivered it to us. I thereupon

took the machine and accompanying literature, assisted by Mr. Holliday, and left the residence. We brought the machine and accompany literature directly to the U. S. Marshal's office in the U. S. Court House and locked it up.

/s/ WILLIAM H. RICKARD.

Subscribed and sworn to before me this 1st day of May, 1946.

[Seal] /s/ V. E. HARR,

Notary Public for Oregon.

My Commission expires: Jan. 1, 47. [30]

[Title of District Court and Cause.]

AFFIDAVIT

I, David J. Holliday, being first duly sworn, depose and say.

That I am an Inspector for the Food and Drug Administration, a branch of the Federal Security Agency, and am stationed in Portland, Oregon.

That on the 28th day of July, 1945, I received a telephone call from the Deputy Marshal asking that I go with him to the home of William R. Olsen, located at 7425 S. E. Insley Street, in the City of Portland, State of Oregon, for the purpose of executing a warrant of seizure against an article

of device labeled in part, "Spectro-Chrome" and accompanying labeling; I had previously been to the William R. Olsen residence on the 21st day of July, 1945, and at that time had talked with William Olsen and members of his immediate family concerning the device known as "Spectro-Chrome"; that about 11 a.m., together with William Rickard, deputy U. S. Marshal, we called at the William Olsen residence and upon knocking at the door William R. Olsen opened it and I introduced the deputy marshal to Mr. Olsen. While I was thus introducing the deputy marshal, the boy's father also came to the door and the deputy marshal stated to them that he had a warrant for the seizure of the "Spectro-Chrome" machine and accompanying labeling. We were invited inside the house and the Marshal began reading the warrant to the two men. As soon as the discussion started the mother appeared and was present during all the conversation that followed. The Olsens interrupted the Marshal while he was attempting to read the [31] warrant and a discussion took place relative to the Marshal's right to seize the machine. The deputy marshal explained that he had a warrant issued by the Clerk of the Court directing him to seize the machine and accompanying labeling and that he was merely carrying out his duties and that he had instructions to execute the warrant and seize the machine. The Olsens protested to the Marshal that he had no right to seize the machine and that they were protesting the seizure and would not permit him to take the machine from their residence. The Marshal at that

time stated to the Olsens that unless they would give up the machine to him, it would be necessary that he return to the Marshal's office to acquire further papers and instructions. After a long discussion regarding the merits of "Spectro-Chrome" and the Marshal's right to seize the machine, the father stated that the Marshal was only doing his duty and that after all they had 30 days within which to redeem the machine, having been so advised by the deputy marshal, and that therefore they had better let the Marshal take it. The son then agreed that the Marshal could take the machine. The Marshal advised him that he could see his attorney or talk with the United States Attorney concerning the seizure. Thereupon the son went into the bedroom and obtained the machine and brought it out into the living room.

Before removing the machine from the premises it was necessary that we dismantle it to some extent. The son upon my request for a screw-driver left the living room, procured a screw-driver, returned to the living room and gave it to me. I thereupon proceeded to remove two bolts from the stand of the machine. The son, William Olsen, held the box which contains the bulb and slides while I was removing the bolts. I asked the boy if he still had the literature that I had seen previously and that we also wanted that. William R. Olsen went to a desk and from a drawer in the desk procured the literature and handed it to me. I thereupon assisted the Marshal in bringing the machine and literature to the car. We then brought the machine

and literature direct to the Marshal's office in the U. S. Court House.

/s/ DAVID J. HOLLIDAY.

Subscribed and sworn to before me this 1st day of May, 1946.

[Seal] /s/ V. E. HARR,
Notary Public for Oregon.

My commission expires January 7, 1947. [32]

CERTIFICATE OF SERVICE BY MAIL

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Affidavits of William Rickard and David J. Holliday on the claimant herein, by depositing in the United States Post Office at Portland, Oregon, on the 1st day of May, 1946, a duly certified copy of each, enclosed in an envelope, with postage thereon prepaid, addressed to Barnett H. Goldstein, Attorney at Law, Failing Building, Portland, Oregon, attorney for claimant, William R. Olsen, Jr.

/s/ J. ROBERT PATTERSON,
Assistant U. S. Attorney.

[Endorsed]: Filed May 1, 1946. [33]

[Title of District Court and Cause.]

PETITION

Comes now the United States of America by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and based upon the records on file herein and the previous proceedings had herein, the orders filed herein, and directions of this Court, petitions the Court for an order directing William R. Olsen, claimant, who has previously appeared herein and filed his claim and answer, to produce the article of device known as "Spectro-Chrome" and accompanying labeling on the 21st day of May, 1946, before this Honorable Court, for the purposes of trial.

HENRY L. HESS,
United States Attorney for
the District of Oregon.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Petition on the claimant herein, by depositing in the United State Post Office at Portland, Oregon, on the 1st day of May, 1946, a duly certified copy of said

Petition, addressed to Barnett H. Goldstein, Attorney at Law, Failing Building, Portland, Oregon, attorney for claimant herein.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

[Endorsed]: Filed May 1, 1946. [34]

[Title of District Court and Cause.]

APPLICATION FOR PRE-TRIAL CONFERENCE

Comes now the United States of America, Libelant, by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and respectfully petitions the court for an order directing Claimant to appear before the Court on the 20th day of May, 1946, for the purpose of pre-trial conference in order that the issues may be simplified and for the further reason that a pre-trial order may be entered limiting the issues for trial.

Dated at Portland, Oregon, this 8th day of May, 1946.

HENRY L. HESS,
United States Attorney for
the District of Oregon,

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney. [35]

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Application for Pre-Trial Conference on the Claimant herein, by depositing in the United States Post Office at Portland, Oregon, on the 8th day of May, 1946, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Barnett H. Goldstein, Attorney at Law, 1225 Failing Building, Portland, Oregon, Attorney for Claimant.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

[Endorsed]: Filed May 8, 1946. [36]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated in the above-captioned case by and between the United States of America, Libelant, by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and the claimant herein, William R. Olsen, and by his attorney, Barnett Goldstein, subject to the reservations here-

inafter set forth, that the following are admitted as facts as though the same were developed by testimony from witnesses under oath in open court to apply in the determination of issues joined, and which, if competent, material and relevant thereto, are to be taken as facts binding upon the parties hereto and named above.

That Dinshah shipped in interstate commerce from Newfield, New Jersey, via Railway Express Agency, on or about June 14, 1945, consigned to William R. Olsen claimant herein, a carton containing an article labeled in part "Spectro-Chrome" consisting essentially of a cabinet equipped with an electric light bulb, an electric fan, a container for water, glass condenser lenses and glass slides each of a different color, the cabinet having an opening in the front through which light from the bulb may shine through the glass slides, which article was intended for use in the cure, mitigation, treatment and prevention of disease and to effect the structure and functions of the body of man, and containing an assortment of written, printed and graphic matter entitled in part "Spectro-Chrome Home Guide," "Favorscope for 1945," "Rational Food of Man," "Key to Radiant Health," 2 "Request for Enrollment as Benefit Student," "Auxiliary Benefit Notice—Make your Own Independent Income as Our Introducer," 5 "Spectro-Chrome [37] General Advice Chart for the Service of Mankind—Free Guidance Request," "Certificate of Benefit Studentship," "Spectro-Chrome—December 1941—Scarlet," "Spectro-Chrome March 1945—

Yellow," which relate to said article, and which contained statements and references to the curative and therapeutic value of said article in the cure, mitigation, treatment and prevention of disease and for the use of said article in affecting the structure and functions of the body of man and directions for the use of said article in the cure, mitigation, treatment and prevention of diseases, disorders, conditions, symptoms and in affecting the structure and functions of the body of man; that said carton containing said article and said items of written, printed, and graphic matter, constituting accompanying labeling within the meaning of 21 U. S. C. 321 (m), were received in interstate commerce by said claimant at Portland, Oregon, on or about June 25, 1945.

That said article is a device within the meaning of 21 U. S. C. 321 (h) and when introduced into and while in interstate commerce its label and labeling, described above, did contain, within the meaning of 21 U. S. C. 352(a), a number of false and misleading statements regarding the capability of the device in measuring and restoring human radio-active and radio-emanative equilibrium and false and misleading statements of claims for said device when used as directed in affecting the structure and functions of the body of man and of its curative and therapeutic value when used as directed in the cure, mitigation, treatment, and prevention of diseases, conditions, symptoms and disorders of man.

It is understood and agreed that the claimant,

by the admissions and stipulations herein contained, does not admit that the same are competent, material or relevant herein, by reason of the following contentions of the claimant, which are factually denied by the Government:

(1) That the court has no jurisdiction over the subject matter of this proceeding, in that, the device, at the time of its seizure from the home of the claimant, was not then being transported or was in the course of interstate commerce, but that it had passed beyond interstate commerce [38] channels and was within the private home and in the exclusive possession of the claimant, with no intention of transporting, selling or otherwise disposing of same, but was acquired, used and intended to be used for the personal use and benefit of the claimant and members of his family, and for no other person or persons, and as so used, in the home of said claimant, it was not labelled within the meaning of the Food, Drug and Cosmetic Act.

(2) That the seizure of said article from the claimant's home at the time and under the conditions and circumstances alleged by claimant, was illegal and in direct violation of the constitutional rights of said claimant, and that the taking of said personal property from the home of and belonging to said claimant was and would be without due process of Law.

That only as to said matters, both parties hereto reserve the right to present testimony in support of and in opposition thereto.

Dated at Portland, Oregon, this 6th day of May, 1946.

HENRY L. HESS,
United States Attorney for
the District of Oregon,

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

/s/ BARNETT GOLDSTEIN,
Attorney for Claimant.

/s/ WILLIAM R. OLSEN,
Claimant.

[Endorsed]: Filed May 15, 1946. [39]

[Tile of Cause.]

ORDER DENYING MOTION

May 21, 1946

Libelant appearing by Mr. J. Robert Patterson, Assistant United States Attorney; Federal Securities Agency by Mr. J. L. Maguire, of proctors, and the claimant, William Ray Olsen by Mr. B. H. Goldstein, of proctors. Whereupon it is ordered that the motion of the libelant for an order directing the claimant to produce device in court and libelant's motion for a summary judgment heretofore filed herein be and each of said motions is hereby denied. Thereafter, this cause comes on to be tried before the Court without the intervention of a jury and the Court having heard the evidence adduced will advise thereof.

[Title of District Court and Cause.]

OPINION

This case having now been tried on the merits revives the question whether an inanimate object, inherently non-dangerous, which the owner thinks has therapeutic value, can be taken from him and his home, under process pursuant to the Federal Food and Drugs Act.

It has been stipulated that the device was shipped in interstate commerce, labeled with false and misleading statements as to its therapeutic capabilities. Regardless, the owner testified that he was satisfied with the machine and wanted to keep it, and that he and his mother had both obtained help for certain disorders by using the machine. He testified further that he did not intend to make commercial use of the machine, did not intend to permit it to be used outside of his home, or by others than his immediate family, constituting his parents and two brothers, both over twenty-one years of age and having had the same education as Claimant, in the grammar and high schools of the city of Portland, Oregon. The Claimant is twenty-three years old, and was employed during the war in aircraft production, where he made use of the education which he had received in technical high school.

The Government relies on the words of the statute, that an article introduced into interstate commerce, with fraudulent representations as to its therapeutic value, may be seized and condemned "while in interstate commerce or any time there-

after . . ." 21 USC Sec. 334 (a). [41] The underlined words, the Government contends, permit it to pursue and seize the article and the literature containing the misleading statements, in a private home.

As shown by an earlier memorandum, the article was seized by the Marshal on initial process, but I must now add that prior to the trial on the merits just concluded, and subsequent to the preliminary memorandum, I directed that the Spectro-Chrome be returned to Claimant's home—so that the case might present, as it now does, the clear cut issue, whether an instrument, harmless in itself, but accompanied by misleading literature as to the capabilities of the instrument, may be seized against his will from an adult male person, compos, who states that he is satisfied with the machine, is being helped by its use, and wishes to keep it.

I think this issue has not before been directly presented and I think, as Judge Cooley said many years ago, that the question is—does this case constitute an exception to the general rule that the citizen's home is his castle, the security of which he may defend against all trespass? The Government has a heavy burden to establish the exception.

"Near in importance to exemption from any arbitrary control of the person is that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers

against even the process of the law, except in a few specified cases. . . ." (p. 425)

". . . it would generally be safe . . . to regard all those searches and seizures 'unreasonable' which have hitherto been unknown to the law, and on that account to abstain from authorizing them, leaving parties and the public to the accustomed remedies." (p. 433)

Constitutional Limitations (7th Ed.)

This case does not present such an exception. The case is nothing more than a well intentioned effort by high-minded and [42] zealous officials to protect a man from what they deem to be folly, to the extent of following him into his home and family and there divesting him of property. This cannot be done, and I regret that I find myself in dissent from those Districts where, in connection with the nationwide campaign to retrieve Spectro-Chrome machines, wherever found, contempt orders have been issued to private owners to compel delivery for condemnation.

To me, the wisdom of the ages means nothing if this humble citizen can be compelled against his will to yield access to his home to Federal officers to take from him and destroy a mechanical object, perfectly harmless in itself, which he thinks (whether rightly or wrongly makes no difference) is beneficial to him. My conception of the meaning of the Fourth Amendment is, that the citizen alone can unlock the doors to his dwelling, except in the rarest cases, and this is not one of the exceptions.

Coke is credited with the maxim that "An Englishman's home is his castle" (which is morticed into the Fourth Amendment of our National Bill of Rights), and I cannot resist adding the imperishable words by Chatham, of a later English generation:

"The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement."

The Right to Prescribe for Oneself

Turning to the other major question in the case, no authority has been shown me that supports the position of the Government, which while admitting the Spectro-Chrome is not inherently dangerous, says in its brief: "It is claimed to be indirectly dangerous because the ailment of the user is aggravated by reason of the failure to consult competent medical authority."

This is admirable frankness on the part of the Government, but, as stated, it is supported by no authority, and I venture that it can be supported by none. I hesitate to labor the point, in opposition to this claim [43] of paternal right, to control the manner in which a person shall seek to cure himself. So many years, generations now, have been devoted to demonstrating that man is often his own best doctor, aside from the question of terrific im-

port of personal liberty involved—it would but be stirring old waters, long calm, to review the successful struggle of healing groups and faiths, unconventional by majority standards.

More, tremendously more, is here involved—the right of the individual to select his own manner and means of treatment. The question is not, whether false and misleading statements were made to Claimant. The question is, what does he want to do about it? He says "Nothing,—I am satisfied. I am being helped." But the Government answers "we won't allow you to be satisfied. We won't allow you to help yourself. We know that you may be led into doing yourself harm, through relying too heavily on his machine, and thus not obtaining proper (by our standards) medical treatment." Without intending to give offense, I think no such proposition of paternal right in the field of public health has been advanced in modern times. At least I have been unable to find it in encyclopedias, treaties or law books.

Conclusion

An easy way of disposing of this case would have been to hold that the attempt to stretch the Government's power of seizure and condemnation under the commerce clause to an article in the hands of the ultimate consumer, raised grave constitutional questions which forbade such construction (Federal Trade Commission v. American Tobacco Company, 264 U. S. 298), but I have preferred to meet head-on and to discuss the questions of security of one's

dwelling and of personal liberty, which I regard as the true issues in the case. I have done this because I gained the impression during the war, [44] and the impression has been strengthened since hostilities ended, that it is time for Federal judges to dust off the Constitution.

Judgment will be for the Claimant.

Dated this 22nd day of May, 1946.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 22, 1946. [45]

[Title of District Court and Cause.]

OBJECTIONS TO THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Comes now the United States of America by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and objects to the proposed findings of fact and conclusions of law, and particularly to that portion of Paragraph V of the proposed findings of fact which state "and claimant does not consent to entry into his home for any purposes connected with this case" for the reason that the Court directed at the time of the trial that there would be no evidence heard on this issue. The following is taken from the transcript of testimony and proceedings:

"Mr. Goldstein: Q. Was this machine forcibly taken from you?

Mr. Patterson: The same objection.

A. Yes.

The Court: I think the seizure is an immaterial issue in this case, inasmuch as I have directed the machine to be returned."

HENRY L. HESS,
United States Attorney for
the District of Oregon,

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney. [46]

United States of America,
District of Oregon—ss.

I certify that on the 3 day of July, 1946, I placed in the mail a certified copy of the foregoing Objections to the Proposed Findings of Fact and Conclusions of Law, addressed to Mr. Barnett H. Goldstein, Failing Building, Portland, Oregon, having first placed thereon sufficient postage to carry the same to its destination.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

[Endorsed]: Filed July 3, 1946. [47]

[Title of District Court and Cause.]

SUGGESTED CHANGES IN THE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

It is respectfully suggested by the libelant that Paragraph V of the Findings of Fact be changed by deleting therefrom the following phrase: "and claimant does not consent to entry into his home for any purposes connected with this case."

HENRY L. HESS,
United States Attorney for
the District of Oregon.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

I, J. Robert Patterson, Assistant United States Attorney, certify that on the 24th day of July, 1946, I placed in the mail a certified copy of the Suggested Changes in the Findings of Fact and Conclusions of Law, addressed to Barnett Goldstein, Failing Building, Portland, Oregon, having first placed thereon sufficient postage to carry the same to its destinatoin.

/s/ J. ROBERT PATTERSON.

[Endorsed]: Filed July 29, 1946. [48]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause coming on regularly for trial before the Court, without a jury, the libelant appearing by J. Robert Patterson, Assistant United States Attorney for the District of Oregon, and Joseph L. Maguire, Attorney for the Federal Security Agency, and the claimant appearing in person and by his attorney, Barnett H. Goldstein, and a trial by jury having been waived, whereupon, certain facts having been stipulated, witnesses on the part of the libelant and claimant were duly sworn and examined, exhibits were introduced by the libelant, and both parties having rested, and thereafter a written opinion having been filed in addition to the previous memorandum opinion,

Now, Therefore, the Court makes and enters the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

That this Court has jurisdiction of the article of device labeled in part "Spectro-Chrome" and accompanying labeling in the sense that the device and labeling are and at all times since the filing of the Information have been within the State and District of Oregon.

II.

That this action is brought by way of libel of

information for condemnation of the article of device labeled in part "Spectro-Chrome" and accompanying labeling pursuant to Section 334, Title 21, U.S.C. [49]

III.

That Dinshah shipped in interstate commerce from Newfield, New Jersey, via Railway Express Agency, on or about June 14, 1945, consigned to William R. Olsen, claimant herein, a carton containing an article labeled in part "Spectro-Chrome" consisting essentially of a cabinet equipped with an electric light bulb, an electric fan, a container for water, glass condenser lenses and glass slides each of a different color, the cabinet having an opening in the front through which light from the bulb may shine through the glass slides, which article was intended for use in the cure, mitigation, treatment and prevention of disease and to affect the structure and functions of the body of man, and containing an assortment of written, printed and graphic matter entitled in part "Spectro-Chrome Home Guide," "Favorscope for 1945," "Rational Food of Man," "Key to Radiant Health," 2 "Request for Enrollment as Benefit Student," "Auxiliary Benefit Notice—Make Your Own Independent Income as Our Introducer," 5 "Spectro-Chrome General Advice Chart for the Service of Mankind—Free Guidance Request," "Certificate of Benefit Studentship," "Spectro-Chrome — December 1941 — Scarlet," "Spectro-Chrome March 1945—Yellow," which relate to said article, and which contained statements and references to the curative and thera-

peutic value of said article in the cure, mitigation, treatment and prevention of disease and for the use of said article in affecting the structure and functions of the body of man and directions for the use of said article in the cure, mitigation, treatment and prevention of diseases, disorders, conditions, symptoms and in affecting the structure and functions of the body of man; that said carton containing said article and said items of written, printed, and graphic matter, constituting accompanying labeling within the meaning of al U.S.C. 321 (m), were received by said claimant at destination, Portland, Oregon, on or about June 25, 1945.

IV.

That said article is a device within the meaning of 21 U.S.C. 321(h) and when introduced into and while in interstate commerce its [50] label and labeling, described above, did contain, within the meaning of 21 U.S.C. 352(a), false and misleading statements regarding the capability of the device in measuring and restoring human radio-active and radio-emanative equilibrium and false and misleading statements of claims for said device when used as directed in affecting the structure and functions of the body of man and of its curative and therapeutic value when used as directed in the cure, mitigation, treatment, and prevention of diseases, conditions, symptoms and disorders of man.

V.

That the article of device labeled in part "Spectro-Chrome" and accompanying labeling are

not inherently dangerous, and claimant does not consent to entry into his home for any purposes connected with this case.

VI.

That the claimant, William R. Olsen, is more than 21 years of age; that he makes his home and lives with his parents at 7425 S. Insley Street; that the said article of device labeled in part "Spectro-Chrome" and accompanying labeling were purchased and acquired by him for the sole and exclusive use of himself and the immediate members of his family, and for none other, and at all times were kept in his home and in his possession for said purpose with no intention now or at any time in the future to transport, sell or use said machine for any commercial purpose whatsoever.

VII.

That the said claimant and his mother have been helped in the treatment of their bodily ailments by the use of said machine and are satisfied therewith.

From the foregoing Findings of Fact, the Court does hereby make [51] and enter the following Conclusions of Law:

Conclusions of Law

I.

That libelant is not entitled to an order or writ of this Court directing the seizure of the device and accompanying labeling from claimant's dwelling without the consent of claimant, and claimant

would be and is entitled to resist the execution of said writ by force.

II.

That claimant and members of his family are entitled to use the device and accompanying labeling for treatment of their bodily ailments, without interference by writ or order of this Court, and without interference by libelant or its agents.

IIa.

That the machine and accompanying labeling at all times while in the home of the said claimant were not being transported or about to be transported or intended to be transported in interstate commerce; were not in the course of interstate commerce and had passed beyond interstate commerce channels and were exclusively within the home and possession of the claimant for his own use with no intention of transporting or selling the same, and that therefore no interstate transportation is or has at any time been involved in this case.

III.

That claimant is entitled to judgment dismissing the libel and adjudging and confirming the return of the article of device and accompanying labeling.

Dated this 1st day of August, 1946.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Aug. 1, 1946. [52]

In the District Court of the United States
for the District of Oregon

Civil No. 2855

UNITED STATES OF AMERICA,

Libelant,

vs.

One article of device labeled in part "SPECTRO-CHROME" and accompanying labeling; WILLIAM R. OLSEN,

Claimant.

JUDGMENT

The above entitled cause having been tried by the Court without a jury and the Court having heretofore made and entered Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Hereby Ordered and Adjudged that the petition of the Libelant for the condemnation of the aforesaid article of device labeled in part "Spectro-Chrome" and accompanying labeling be, and the same is hereby, denied, and the libel is dismissed.

It Is Hereby Further Ordered and Adjudged that return of the said article of device labeled in part "Spectro-Chrome" and accompanying labeling to the Claimant herein, William Ray Olsen, is adjudged and confirmed.

Dated this 1st day of August, 1946.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Aug. 1, 1946. [53]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: William R. Olsen, Claimant as above named, and Barnett H. Goldstein, his attorney.

You and each of you will please take notice that the libelant, United States of America, appeals to the Circuit Court of Appeals for the Ninth Circuit, from that certain judgment in the above-entitled cause made and entered the first day of August, 1946, by the Honorable Claude McColloch, Judge of the above-entitled Court, wherein the claimant recovered judgment denying the petition of the libelant for condemnation of the above-mentioned article of device labeled in part "Spectro-Chrome" and accompanying labeling and further dismissing the libel and further ordering and confirming the return of the said article of device labeled in part "Spectro-Chrome" and accompanying labeling to the claimant, William Ray Olsen.

HENRY L. HESS,
United States Attorney for the District of Oregon.

By /s/ J. ROBERT PATTERSON,
Assistant United States Attorney. [54]

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Notice of Appeal on the Claimant herein, by depositing in the United States Post Office at Portland, Oregon, on the 2nd day of August, 1946, a duly certified copy thereof, enclosed in an envelope, with postage theeron prepaid, addressed to Barnett H. Goldstein, Attorney at Law, Failing Building, Portland, Oregon, Attorney for William Ray Olsen, Claimant.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

[Endorsed]: Filed Aug. 2, 1946. [55]

At a Stated Term, to wit: The October Term 1945, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday, the ninth day of August, in the year of our Lord one thousand nine hundred and forty-six.

Present: Honorable Francis A. Garrecht,
Senior Circuit Judge, Presiding,
Honorable William Healy, Circuit Judge,
Honorable William E. Orr, Circuit Judge.

No. 11403

UNITED STATES OF AMERICA,
Appellant,

vs.

WILLIAM R. OLSEN, Claimant of one article of device labeled in part "SPECTRO-CHROME", and accompanying labeling,
Appellee.

ORDER STAYING PORTION OF JUDGMENT OF DISTRICT COURT PENDING APPEAL

Upon consideration of the petition of the United States of America, for an order staying a portion of the judgment entered in this cause by the District Court of the United States for the District of Oregon on August 1, 1946, pending determination

of the appeal herein heretofore taken by the appellant, and good cause therefor appearing,

It Is Ordered that the portion of the said judgment of the said District Court in the following words:

> "It is hereby further ordered and adjudged that return of the said article of device labeled in part 'Spectro-Chrome' and accompanying labeling to the Claimant herein, William R. Olsen, is adjudged and confirmed."

be, and hereby is stayed pending the disposition of the appeal herein. [56]

I Hereby Certify that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 9th day of August, 1946.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Aug. 12, 1946.

In the District Court of the United States
for the District of Oregon

Civil No. 2855

UNITED STATES OF AMERICA,

Libelant,

vs.

One article of device labeled in part "SPECTRO-CHROME and accompanying labeling WILLIAM R. OLSEN,

Claimant.

ORDER

This Matter coming on to be heard before the undersigned Judge of the above-entitled Court on the motion of the libelant to extend the time to and including the 31st day of October, 1946, within which to file the record on appeal and docket the action, and it appearing to the Court that there is good cause and that it is proper to grant the extension of time, and the Court being fully advised, It Is Therefore Ordered that the libelant be, and it is hereby, granted an extension of time to and including the 31st day of October, 1946, within which to file the record on appeal and docket the action.

Dated at Portland, Oregon, this 9th day of September, 1946.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Sept. 9, 1946. [57]

[Title of District Court and Cause.]

ORDER

This Matter coming on to be heard upon the motion of the libelant and it appearing to the Court that a notice of appeal has been filed in the above-entitled case; and it further appearing that it is necessary that the exhibits which were entered and made a part of the record in this trial be forwarded to the Circuit Court of Appeals for the Ninth Circuit to be considered along with the record on appeal, the Court being fully advised;

It Is Therefore Ordered that the Clerk of this Court forward to the Clerk of the Circuit Court of Appeals for the Ninth Circuit all of the exhibits which are enumerated as Libelant's Exhibits 1 through 17, inclusive, these being the entire number of exhibits which were introduced and received and made a part of the record in the District Court.

Dated at Portland, Oregon, this 27th day of September, 1946.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Sept. 27, 1946. [58]

[Title of District Court and Cause.]

DOCKET ENTRIES

1945

July 26—Entered order to file libel. Fee.

July 26—Filed libel.

July 26—Filed and entered order for process. Fee.

July 26—Filed praecipe U. S. Atty. for two cert. copies above order.

July 27—Issued warrant of seizure and monition—to marshal.

July 27—Issued 2 cert. copies Order—to marshal.

July 31—Filed warrant of seizure and monition, with marshal's return.

Aug. 17—Filed affidavit of publication.

Aug. 31—Filed appearance and answer of claimant.

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Feb. 20—Filed motion of U. S. Atty. for order for marshal to deliver part of device to F. & D. Adm.

Mar. 4—Entered order continuing motion of ptff. for scientific examination of colored slides to March 11, 1946 and order continuing another motion (to be filed) to same date. McC.

Mar. 4—Filed motion for order directing claimant to file stipulation for costs.

Mar. 4—Entered order resetting for pre-trial conference on March 11, 1946. Attys. notified McC.

Mar. 11—Record of hearing on motion of U. S. to detach slides and make scientific examination and on motion for order directing

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claimant to file stipulation for costs; argued and taken under advisement and order allowing 10—10 and 5 days for briefs. McC.

Apr. 4—Filed opinion of Judge McColloch.

Apr. 4—Entered order denying motion of U. S. to detach slides and make scientific examination. McC.

Apr. 16—Entered order setting for trial on May 21, 1946—10 a.m. McC.

Apr. 23—Filed motion to quash warrant, etc.

Apr. 24—Filed plaintiff's memorandum (sub. to J. McColloch).

Apr. 24—Filed motion of ptff. for summary judgment.

Apr. 25—Entered order setting hearing on ptff's. motion for summary for May 21, 1946—10 a.m. attys. notified. McC.

Apr. 29—Entered record of hearing on claimants motion to quash, to restore seized articles to claimant and to dismiss proceedings; argued and order entered that seized articles be returned forthwith to claimant. McC.

May 1—Filed affidavits of Wm. Rickard and David J. Holliday.

May 1—Filed petition of U. S. for order to produce Spectro-Chrome.

May 2—Filed praecipe, U. S. atty., subpoenas.

May 2—Issued subpoenas—to marshal.

May 2—Lodged order directing marshal to restore seized machine (not signed).

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May 8—Filed application of libelant for pretrial conference.

May 14—Filed (3) subpoenas with marshal's return.

May 15—Filed Stipulation. [59]

May 17—Filed memorandum of law.

May 18—Filed subpoena.

May 20—Filed telegram from Irene Grace Dinshah Ghadiali.

May 20—Filed telegram from Dinshah P. Ghadiali.

May 20—Filed air mail letter (unopened) from Irene Grace Dinshah.

May 21—Entered order denying motion of ptff. that claimant produce device at trial; order denying motion for summary judgment; record of trial before court and order taking under advisement. McC.

May 22—Filed written opinion. McC.

May 22—Entered order to prepare judgment. Notice to attys. McC.

May 24—Filed (2) subpoenas with returns.

May 24—Entered order setting hearing on proposed Findings of Fact, Conclusions of Law and Judgment for June 25, 1946. Attys. notified. McC.

May 25—Entered record of hearing on proposed Findings, Conclusions and Judgment. McC.

July 3—Filed objections to the proposed findings of fact and conclusions of law.

July 29—Filed suggested changes in the Findings of Fact and Conclusions of Law.

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Aug. 1—Filed and entered Findings of Fact and Conclusions of Law. Attys. notified. McC.

Aug. 1—Filed and entered Judgment (dismissing) attys. notified. McC.

Aug. 2—Filed notice of appeal by U. S. Atty.

Aug. 2—Filed praecipe of U. S. Atty. for copy of above.

Aug. 2—Issued cert. copy notice of appeal to Asst. U. S. Atty.

Aug. 2—Filed praecipe, U. S. Atty., 4 cert. copies Judgment.

Aug. 2—Issued 4 cert. copies Judgment—to U. S. Atty.

Aug. 12—Filed copy of order staying return of spectro-chrome to Olsen.

Aug. 23—Filed arguments in re findings etc. June 25, 1946.

Sept. 9—Filed motion with affidavit for order allowing to and inc. Oct. 31, 1946, to file record on appeal.

Sept. 9—Filed and entered order allowing to and inc. Oct. 31, 1946, to file record on appeal. McC.

Sept. 27—Filed and entered order to send exhibits to Circuit Court of Appeals. McC.

Oct. 11—Filed designation of record.

Oct. 11—Filed transcript of hearing dated April 29, 1946.

Oct. 11—Filed transcript of testimony and proceedings dated May 21, 1946.

Oct. 11—Filed transcript of arguments in re findings, etc. dated June 25 (carbon copy).

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the District Court of the United States for the District of Oregon:

Libelant-appellant designates the following as the record to be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit in the appeal of the above-entitled case, it being the libelant-appellant's intention to designate the entire and whole record:

1. Libel of Information.

2. Order of July 26, 1945, allowing libel to be filed.

3. Order of July 26, 1945, directing that process issue and directing publication.

4. Warrant of seizure and monition.

5. Marshal's return of service of the writ.

6. Affidavit of publication.

7. Appearance and answer of claimant.

8. Motion to make scientific examination of slides.

9. Motion for order directing claimant to file stipulation for costs.

10. Order of March 11, 1946, reserving decision on Libelant's Motion.

11. Memorandum Opinion of Judge McColloch dated April 4, 1946.

12. Order of April 4, 1946, denying Libelant's Motion to detach glass slides.

13. Order setting case for trial.

14. Claimant's Motion to Quash Warrant, restore seized article to claimant, and to dismiss libel.

15. Affidavit of William R. Olsen, claimant.

16. Libelant's Motion for Summary Judgment.

17. Order dated April 29, 1946, directing seized articles to be restored to claimant.

18. Affidavit of William Rickard, Deputy Marshal, and affidavit of David J. Holliday.

19. Petition for order directing claimant to produce the seized device and accompanying labeling.

20. Application for Pre-Trial Conference.

21. Stipulation between libelant and claimant.

22. Order denying Motions dated May 21, 1946.

23. Judge McColloch's Opinion dated May 22, 1946.

24. Libelant's objections to proposed Findings of Fact and Conclusions of Law.

25. Suggested changes in the Findings of Fact and Conclusions of Law.

26. Findings of Fact and Conclusions of Law.

27. Judgment.

28. Notice of Appeal.

29. Order of Circuit Court of Appeals for the

Ninth Circuit dated August 9, 1946, staying return of device to claimant.

30. Order extending time to docket the appeal and file transcript on appeal.

31. Order directing Clerk to forward exhibits.

32. Transcript of Pre-Trial proceedings.

33. Transcript of trial proceedings.

34. Transcript of hearings on Findings of Fact and Conclusions of Law.

35. Designation of Record (D. C.).

Dated this 11th day of October, 1946.

HENRY L. HESS,
United States Attorney
for the District of Oregon,

/s/ J. ROBERT PATTERSON,
Asst. United States Attorney.

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Designation of Record on the Claimant-Appellee herein, by depositing in the United States Post Office at Portland, Oregon, on the 11th day of October, 1946, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Barnett

H. Goldstein, Attorney at Law, Failing Building, Portland, Oregon, Attorney for Claimant-Appellee.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

[Endorsed]: Filed Oct. 11, 1946. [63]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 to 64 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 2855, in which the United States of America is Libelant and Appellant, and William R. Olsen is Claimant and Appellee; that the said transcript has been prepared by me in accordance with the designation of the contents of the record on appeal filed by the Appellant, and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that there is enclosed with this

transcript of record on appeal, transcript of hearing dated April 29, 1946, transcript of testimony and proceedings dated May 21, 1946, transcript of proceedings dated June 25, 1946, and exhibits Nos. 3 to 17 inclusive filed in this cause.

I further certify that exhibits Nos. 1 and 2, Spectro-Chrome machines, went forward by express, October 21, 1946.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 22nd day of October, 1946.

[Seal] LOWELL MUNDORFF,
Clerk,

By /s/ F. L. BUCK,
Chief Deputy. [64]

In the District Court of the United States
for the District of Oregon

Civil No. 2855

UNITED STATES OF AMERICA,
Libelant,

vs.

One Article of Device Labelled "SPECTRO-CHROME" and accompanying labeling; and WILLIAM RAY OLSEN,
Claimant.

Portland, Oregon, Monday, April 29, 1946

10:10 o'clock a. m.

Before: Honorable Claude McColloch, Judge.

Appearances:

Mr. J. Robert Patterson, Assistant United States Attorney, appearing for the Libelant.

Mr. Barnett H. Goldstein, Attorney for the Claimant.

Alva W. Person, Court Reporter.

TRANSCRIPT OF PRE-TRIAL PROCEEDINGS

The Court: You have a motion to quash, Mr. Goldstein?

Mr. Goldstein: Yes, your Honor. Mr. Patterson is here. May I proceed?

The Court: Yes, briefly.

Mr. Goldstein: If the Court please, in this matter of the United States of America vs. One Article of Device Labeled "Spectro-Chrome"——

Mr. Patterson: Excuse me. If your Honor please, I would like to have Mr. McGuire, from Washington, of the Federal Security Agency, sit here during the argument of the motion. He is an attorney, your Honor.

The Court: What branch?

Mr. Patterson: The Federal Security Agency.

The Court: I know. I never heard of it before. That is a new department in the Government?

Mr. Patterson: No, it is not. The Federal Security Agency is under the Department of Agriculture.

The Court: That is what I want to know.

Now, Mr. Goldstein.

Mr. Goldstein: If the Court please, in this case, as was previously pointed out, the issue involved is the right of the Government to seize this article from the possession of the private citizen. In accordance with the Admiralty laws the answer was filed and the case is now at issue.

However, I have made every effort I could, and I [2*] trust I may be permitted to digress a moment to call attention to the fact that while the Government plainly intends to make this a test case, and one that, if unsatisfactory to the Government's position, would undoubtedly go to the Circuit Court of Appeals and possibly to the Supreme Court of the

* Page numbering appearing at top of page of original Reporter's Transcript.

United States, the claimant is in no financial position to meet this unequal contest, and so in view of my contention that so far as we are concerned we are raising no question as to the merits of the machine itself but merely depending and relying upon the Constitutional rights guaranteed to us by the Constitution. I think the legal question, if passed upon by this Court, would enable the Government to prosecute any appeal, if it is unsatisfactory to them, to any court they want and we will meet them on that Constitutional ground, and we are in no position to meet them on any question where it would involve the testimony over a period of weeks of time, as indicated by a previous hearing of experts called by the Government, and with unlimited expense, to testify as to the curative value or lack of curative value of this machine. We are in no position to meet that contest.

And so, in view of the position we take, in view of the willingness to concede that, regardless of what the Government may claim as to its curative value or lack of curative value, we contend on the face of the record, as it now stands, in view of the affidavit that has been filed setting up the [3] facts of the seizure and the manner of the seizure, and that no counteraffidavit has been filed, that so far as the factual situation is concerned it stands undisputed and so we feel the matter, which I hope the Court may be able to pass upon and decide, and if unfavorable to us we are through. In other words, we have given the Government a 90-dollar machine; they can do with it as they please; but if the Court's

decision is favorable to our position the Government can take an appeal. They can raise the question, and it would not involve claimant in any unusual expense as it would if we had a trial of some two or three weeks' duration and listening to the testimony of doctors sent from Chicago and all over the country to testify as to the failure of the machine to do the things that the original inventor or original manufacturer claimed. And this man is not claiming to anybody except to himself and his conscience, and he filed the motion to quash the warrant that has been issued directing that this machine be taken from this man's private home, which warrant was perfunctorily issued by the Clerk pursuant to a complaint or libel filed by the United States Attorney, supported by his own affidavit, which, on the face of it, is an affidavit without any personal knowledge of himself and based upon information of others, and, secondly, is not supported by the type of averment that is necessary to secure the issuance of a search warrant, as required by our Constitution, and we are asking [4] that the warrant that was issued be quashed and the machine be restored to us that was improperly and illegally seized, and the libel be dismissed.

And in support of that I have filed a brief memorandum, setting forth three specific grounds on which we claim the Court would be absolutely justified in quashing the warrant restoring the seized article to the claimant and dismissing the libel proceedings, because, as stated, the affidavit sets forth the fact that this young man, an adult person about twenty-

two years of age, and who is making a bare livelihood supporting himself and his invalid mother in a private home, bought a machine called a "Spectro-Chrome," that he paid for it, is using it in his private home for his own purposes, not with the intention of using it on others or transporting it in interstate commerce. Of course, we understand that it is the contention that this machine was shipped in interstate commerce or was in the course of interstate commerce, and we contend in the very first instant, without any denial, or any affidavit or dispute, that the Court has no jurisdiction over property where no transportation was involved at the time of the seizure.

In 11 American Jurisprudence 18, wherein the text reads, "The regulatory power of Congress over interstate commerce does not attach until such intercourse begins, and conversely the power of Congress ceases when interstate commerce [5] ends."

In the case of United States v. 2 Bags, 54 Fed. Supp. 706, a libel proceeding in the Federal Court, the opinion reads:

"The label of the product must be tested by its condition at the time of seizure"; and the time of seizure was long past the time when interstate commerce had ended.

Here reading further, "The Court should not determine that it is contraband merely because of the possibility that it might be used subsequently to deceive." And that is the only theory upon which the Government can claim its seizure, that it is

contraband and therefore subject to seizure wherever they can find it.

Then reading further from the opinion, "In other words, the inference is that the seizure must be made while the article or device is apt to be transported in interstate commerce, or in the course of interstate commerce, but in reality has passed beyond interstate commerce channels and is exclusively within the possession of a private individual for his own use, with no intention of transporting same or selling same."

I am quoting the words of a Court that passed upon the same situation as here.

The Court: I am not going to let the Government go into a private home and take this device away like they did, any more than I would let them go in there and break down a door, or threaten to go in and break it down and take a bottle of [6] Dr. Carter's Little Liver Pills, or contraceptives, for another example. Somebody else can do that if they want to, either of equal rank or superior rank, but I am not going to hold it, and I have known I wasn't going to hold it ever since I heard the statement of the Government's case. Nevertheless, if they want to make a test case of this they are going to be permitted to do so. I realize the difficulties made for the claimant as well as for me, and I have a solution of it. If the Government wants to bring a large number of witnesses here, as I understand is their plan, to make a record, I will make a reference. You don't need to attend, if you don't want to. I don't expect to attend, be-

cause I have got other things to do, and then I will hear, before the case is closed, the testimony which I consider is material from my point of view, namely, what the claimant has to say, which has so far not been denied, as to the circumstances under which the entry was made into the home and as to the uses the claimant and his family were making and intend to make of the machine. That will simplify your problem, and it will be in accord with established practice.

Mr. Goldstein: Did I understand your Honor to say it had been denied by the Government?

The Court: What had been denied?

Mr. Goldstein: About the matter of entry.

The Court: No, I didn't say that. [7]

Mr. Goldstein: Because there is no counter-affidavit filed, because I assume it is admitted.

The Court: I can't decide this case on affidavits. This is a lawsuit under Federal rules, which, like any other lawsuit, has to be decided on testimony of witnesses. It can't be decided by affidavit.

Mr. Goldstein: May I make a suggestion?

The Court: I can't give it a week or two weeks. I will make a reference.

Mr. Goldstein: The case is set for trial the 21st of May, which is satisfactory, but I have a case set for the 22nd of May in Kelso, Washington. There is no jury involved. Could we continue it so it won't interfere with my trial date there? Otherwise it places me in an awkward predicament.

The Court: I don't know. You and Mr. Patterson will have to decide that.

Mr. Patterson: There is some testimony about certain procedures. I should think we could have testimony taken next Monday, before it is necessary that the Government go to the merits of the case and expend fifteen or twenty thousand dollars in bringing witnesses to produce out here on the merits of the case.

The Court: Mr. Patterson, you are asking me to split up a case and try it on one issue——

Mr. Patterson: No. [8]

The Court: Wait a minute. Hear me through. Mr. Goldstein would like to have me do that for his own reasons; you would like to have me do it, and I am not going to do it for my own reason.

Mr. Patterson: No. If the Court overrules the motion——

The Court: I am not going to overrule the motion. I just told you it was a case where we could not do that. That means a search and seizure will be decided on the testimony made from the witness chair. I am going to make a reference, so I will have to make it to a Master. You make a record and I will read the record and hear argument.

Now meanwhile, Marshal, I direct you to return the machine today to the home from which your office took it, forthwith.

Deputy U. S. Marshal Meyer: Yes, sir.

Mr. Patterson: Now, if your Honor please, I would like to move the Court for an order setting the Court's order aside, directing the return of the machine, pending an appeal.

The Court: An appeal from what?

Mr. Patterson: Oh, from the Court's order. What is the basis of returning the machine, your Honor, may I inquire? Are you sustaining Mr. Goldstein's motion to quash the warrant? Are you setting aside the other Court's order, or how? I just don't quite understand the procedure as to the return of the machine. It is now under seizure on the Court's order. [9]

The Court: Oh, yes.

Mr. Patterson: Is that order set aside?

The Court: Well, you figure that out.

Mr. Hess, where is your opponent?

(The Court and Mr. Hess here conversed.)

Mr. Patterson: During the indulgence of the Court may I say a few words?

The Court: Wait until I finish here.

Mr. Patterson: Yes.

(Short pause, the Court and the Clerk conversing.)

The Court: Now, Mr. Patterson.

Mr. Patterson: Yes. If the Court please, this case of the "Spectro-Chrome" is an action against an article itself, and if the Court orders that the machine be returned there would be no proceeding, if that is the Court's order, that the libel be dismissed. This is an action in rem against the machine itself, and if your Honor is directing that the machine be returned and the attachment is dissolved, that finishes it, if that is the Court's order. I would like to know that. I think the Government

is entitled to know this. We don't proceed against this machine as a test case. This machine was proceeded against in the other trial and declared contraband by a jury.

The Court: Now cut that out. I don't want to hear any more about that trial. When we have proceedings against [10] ship down here at the dock we don't bring it in the courtroom.

Mr. Patterson: But it has to be under attachment or under Court order.

The Court: Just because this machine goes back to the home it does not cease to be a proceeding in rem. The machine is not going out of the jurisdiction of the Court.

Now do any of you other gentlemen have something?

(There were no further proceedings in the foregoing case had on this day.) [11]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand the proceedings had in the above-entitled cause before the Honorable Claude McColloch, Judge, on Monday, April 29, 1946; that I thereafter reduced by shorthand notes of said proceedings had into typewriting, and the foregoing transcript, pages numbered 1 to 11, both inclusive, contains a full, true and correct record of the pro-

ceedings had upon said date in the above-entitled cause.

Dated at Portland, Oregon, this 29th day of April, A.D. 1946.

/s/ ALVA W. PERSON,
Court Reporter.

[Title of District Court and Cause.]

PROCEEDINGS

Portland, Oregon, Tuesday, May 21, 1946

10:00 o'clock a. m.

TRANSCRIPT OF TRIAL

Mr. Patterson: The Government is ready, your Honor.

Mr. Goldstein: The claimant is ready, your Honor. [1*]

Mr. Patterson: I would like to have permission to have Mr. Moulton sit here during the trial. He is the head of the Food and Drug Administration in Portland and has had a lot to do with the investigation of the case.

The Court: All right. Call a witness.

Mr. Patterson: If your Honor please, before calling any witnesses, I would like to again urge upon the Court the Government's motion to apply to the Court for an order directing William Ray

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* Page numbering appearing at top of page of original certified Transcript of Record.

Olsen to produce the machine for the purposes of this trial.

The Court: The motion is denied.

Mr. Patterson: Does your Honor care to also rule on the Government's motion for summary judgment at this time?

The Court: Motion denied.

Mr. Patterson: Has there been any ruling on the claimant's motion to quash the warrant, restoring the seized articles to the claimant and dismissing the libel proceeding?

The Court: That question becomes moot with the disposition of the other motions.

Mr. Patterson: If your Honor please, we have two of the machines which we wish to bring up from the office. It will take just a few minutes to bring them up.

In order to save time, I wish at this time to read into the record the stipulation which has been entered into between the claimant and the Government. [2]

The Court: That won't be necessary. If you want it in the record, the reporter can copy it in.

Mr. Patterson: All right. As I understand, that will be in the record, though.

The Court: If you wish it.

Mr. Patterson: Yes, I do.

The Court: It may be copied in at this place.

Mr. Patterson: All right.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated in the above-captioned case by and between the United States of America, Libelant, by Henry L. Hess, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and the claimant herein, William R. Olsen, and by his attorney, Barnett Goldstein, subject to the reservations hereinafter set forth, that the following are admitted as facts as though the same were developed by testimony from witnesses under oath in open court to apply in the determination of issues joined, and which, if competent, material and relevant thereto, are to be taken as [3] facts binding upon the parties hereto and named above.

That Dinshah shipped in interstate commerce from Newfield, New Jersey, via Railway Express Agency, on or about June 14, 1945, consigned to William R. Olsen, claimant herein, a carton containing an article labeled in part "Spectro-Chrome" consisting essentially of a cabinet equipped with an electric light bulb, and electric fan, a container for water, glass condenser lenses and glass slides each of a different color, the cabinet having an opening in the front through which light from the bulb may shine through the glass slides, which article was intended for use in the cure, mitigation, treatment and prevention of disease and to affect the structure and functions of the body of man, and containing an assortment of written, printed

and graphic matter entitled in part "Spectro-Chrome Home Guide", "Favorscope for 1945", "Rational Food of Man", "Key to Radiant Health", 2 "Request for Enrollment as Benefit Student", "Auxiliary Benefit Notice—Make Your Own Independent Income as Our Introducer", 5 "Spectro-Chrome General Advice Chart for the Service of Mankind—Free Guidance Request", "Certificate of Benefit Studentship", "Spectro-Chrome — December 1941 — Scarlett", "Spectro-Chrome March 1945—Yellow", which relate to said article, and which contained statements and references to the curative and therapeutic value of said article in cure, mitigation, treatment and prevention of disease and for the use of said article in affecting the structure and [4] functions of the body of man and directions for the use of said article in the cure, mitigation, treatment and prevention of diseases, disorders, conditions, symptoms and in affecting the structure and functions of the body of man; that said carton containing said article and said items of written, printed, and graphic matter, constitutiong accompanying labeling within the meaning of 21 U.S.C. 321 (m), were received in interstate commerce by said claimant at Portland, Oregon, on or about June 25, 1945.

That said article is a device within the meaning of 21 U.S.C. 321 (h) and when introduced into and while in interstate commerce its label and labeling, described above, did contain, within the meaning of 21 U.S.C. 352 (a), a number of false and misleading statements regarding the capability

of the device in measuring and restoring human radio-active and radio-emanative equilibrium and false and misleading statements of claims for said device when used as directed in affecting the structure and functions of the body of man and of its curative and therapeutic value when used as directed in the cure, mitigation, treatment, and prevention of diseases, conditions, symptoms and disorders of man.

It is understood and agreed that the claimant, by the admissions and stipulations herein contained, does not admit that the same are competent, material or relevant herein, by reason of the following contentions of the claimant, which are [5] factually denied by the Government:

(1) That the court has no jurisdiction over the subject matter of this proceeding, in that, the device, at the time of its seizure from the home of the claimant, was not then being transported or was in the course of interstate commerce, but that it had passed beyond interstate commerce channels and was within the private home and in the exclusive possession of the claimant, with no intention of transporting, selling or otherwise disposing of same, but was acquired, used and intended to be used for the personal use and benefit of the claimant and members of his family, and for no other person or persons, and as so used, in the home of said claimant, it was not labelled within the meaning of the Food, Drug and Cosmetic Act.

(2) That the seizure of said article from the

claimant's home at the time and under the conditions and circumstances alleged by claimant, was illegal and in direct violation of the constitutional rights of said claimant, and that the taking of said personal property from the home of and belonging to said claimant was and would be without due process of law.

That only as to said matters, both parties hereto reserve the right to present testimony in support of and in opposition thereto.

Dated at Portland, Oregon, this 6th day of May, 1946.

HENRY L. HESS,
United States Attorney for
the District of Oregon. [6]

/s/ J. ROBERT PATTERSON,
Assistant U. S. Attorney,

/s/ BARNETT GOLDSTEIN,
Attorney for Claimant,

/s/ WILLIAM R. OLSEN,
Claimant.

Mr. Patterson: If your Honor please, I would like to have this machine marked.

The Court: Bring it up.

("Spectro - Chrome" machine thereupon marked Libelant's Identification No. 1.)

Mr. Patterson: If your Honor please, a witness

was subpoenaed to appear here today at this trial in order to identify the device which has been marked as Government's Exhibit 1. I wonder at this time whether the Claimant has any objection as to whether this is or is not a bona fide "Spectro-Chrome" machine, produced and manufactured by the Dinshah Spectro-Chrome Institute, Malaga, New Jersey?

Mr. Goldstein: In view of the Claimant's position, that all this is irrelevant and immaterial, we cannot very well accede to counsel's request.

I wish to call attention to the fact that a stipulation between the parties has already been entered in the record, made a part of the record, as I understand it, and that the issues are confined to two or three simple legal questions [7] and one involving the matter of procedure. So far as the other matters are concerned, in connection with the machine itself, they are not in issue at the present time, and, therefore, we object to the introduction of any exhibits that have nothing to do with the case.

The stipulation specifically says "That only as to said matters, both parties hereto reserve the right to present testimony in support of and in opposition thereto." By the stipulation, we are not permitted to introduce any evidence at this time.

Mr. Patterson: If your Honor please, this is an action in rem against the machine itself and, in view of your Honor's ruling that the original machine and the literature that was seized would not be required to be produced before the Court at the

time of trial, I felt that, in order to preserve the Government's right to appeal, if there was an appeal, there should be something in the record, to become a part of the record so that the appellate court would know what we are proceeding against.

The Court: Mr. Maguire, can you identify that machine as similar to the machine involved?

Mr. Maguire: Yes, I can.

The Court: You can come up here and be sworn and identify it in your own words. [8]

JOSEPH L. MAGUIRE

was thereupon produced as a witness on behalf of the Libelant and, being first duly sworn, testified as follows:

The Court: State in your own way—make a statement in your own way, so as to make the record complete, subject to cross examination.

Mr. Goldstein: Merely for the purpose of the record, your Honor, may the record show that Claimant objects to the proposed testimony that is about to be submitted by Mr. Maguire, on the ground, first, it is incompetent, irrelevant and immaterial, and not binding upon the Claimant; and, second, upon the ground that the stipulation of the parties, which has already been entered into and made a part of this record, confines the issues to be presented at this trial, and this testimony is outside the scope of those issues.

The Court: To the extent that it may be outside

(Testimony of Joseph L. Maguire.)

the stipulation—I don't know that it is—the Govment is relieved of the stipulation. Now, go ahead, Mr. Maguire.

A. I have seen a number of "Spectro-Chrome" machines, both of the model that has been marked as Government's Identification No. 1——

The Court: You had better identify yourself for the record, first. What is your official position?

A. I am an attorney with the Federal Security Agency, assigned to the Food and Drug Division, General Counsel's office. [9]

As I said, I have seen a number of "Spectro-Chrome" machines, both of the type or model that has been marked as Government's Identification No. 1, also of the type that is also present in court, being a wood model, such model being——

The Court: Mark that one also. Is that the wood model that you refer to? A. Yes.

The Court: Let's mark that No. 2.

("Spectro-Chrome" machine, wood model, was thereupon marked Libelant's Identification No. 2.)

A. A machine similar to Government's Identification No. 2 was the subject matter of a seizure trial in the Eastern District of New York just a year ago this time——

Mr. Goldstein: That is objected to as being hearsay, and is incompetent, irrelevant and immaterial, and not binding upon the claimant.

The Court: You may continue, subject to the objection.

(Testimony of Joseph L. Maguire.)

A. At that trial—prior to that trial, there was a pre-trial conference and a pre-trial order signed, a copy of which I have in my file here. One of the items in the pre-trial order was an admission by the claimant in that action who testified on the trial that he was the inventor of the machine and the originator of "Spectro-Chrome" Metry; that all machine that he had manufactured since the early 20's through to the present time are substantially the same. [10]

Mr. Goldstein: In order that the record may be preserved, in so far as the Claimant's rights are concerned, may we have an understanding now, so I won't have to object any further, that the objection of the Claimant goes to all of this line of testimony, that it is incompetent, irrelevant and immaterial in so far as the Claimant is concerned?

The Court: It is so understood.

A. The unqualified admission on the part of the inventor, Dinshah Ghadiali, was that the theory behind his so-called science and the machines from the time of their initial manufacture in the early 20's through to the present was substantially the same; that although the models and forms of the machines have changed from time to time, the theory behind the Spectro-Chrome Metry has been the same, and the substance of the machines themselves, in that, in particular, only the rays of the visible spectrum emanate from the machine, and that includes machines of any and all models.

(Testimony of Joseph L. Maguire.)

Mr. Patterson: Q. These machines, Mr. Maguire, are identified by serial numbers?

A. That is correct, and I may say as to these two exhibits, which have been marked for identification here, they are in inviolate in that the cells of the semaphores, that part of the machine that contains the slides are still intact.

The Court: Which one of these is like the device in this case? [11]

A. I don't know, your Honor, that I have ever seen the device that was seized in this particular case. I do know from the record that the serial number of the machine that was seized is probably only about 17 away from the serial number of the machine that has been marked——

The Court: No. 1?

A. ——No. 1, yes.

Mr. Patterson: That is all.

The Court: Do you want to state how many have been sold throughout the country?

A. I am quite sure I don't know, your Honor.

The Court: I thought you wanted to tie up your numbers there.

A. I might say that the serial number of this machine, Government Identification No. 1, is BF-8979 and, if I am not mistaken, the machine that was seized in this case on trial was No. 8962.

The Court: Are there further questions?

Mr. Paterson: No, your Honor.

Mr. Goldstein: No, your Honor.

Mr. Patterson: That is all.

(Witness excused.)

Mr. Patterson: At this time, we will offer Government's Exhibits 1 and 2 in evidence and also the literature——

Mr. Goldstein: Objected to as incompetent, irrelevant and immaterial, not binding upon the Claimant and not within the [12] issues permitted under the stipulation.

Mr. Patterson: The literature which I also offer, and which has not been marked as yet, consists of copies of the literature that was seized in this case, and that may be read if the Court desires it, to show that they are the same as the literature that was seized. This has been made necessary because of the fact that the literature that was seized is not before the Court at this time.

While some of the copies are identical as to printed matter, there are some typewritten notations and also addresses of other people that are not identical with the seized literature, but, as far as the printing is concerned, it is identical. We will offer these in evidence.

The Court: They are admitted, subject to the objection of counsel.

Mr. Patterson: Perhaps the record should show what each exhibit is.

The Court: All right. Take the time to number them now. The machines are numbered 1 and 2.

(The following articles and items of printed matter were thereupon received in evidence and marked as follows:

Libelant's Exhibits

No. 1 "Spectro-Chrome" machine.

No. 2 "Spectro-Chrome" machine, wooden model. [13]

No. 3 Booklet entitled "Spectro-Chrome Home Guide, by Dinshah P. Ghadiali, Originator of Spectro-Chrome Metry" (Fifth Edition).

No. 4. Booklet "Favorscope for 1945, for Spectro-Chrome Metry".

No. 5 Pamphlet "Rational Food of Man. A concise exponence by Dinshah."

No. 6 Pamphlet "Spectro-Chrome, Dinshah. 1 cent a day—keeps doctors away! Key to Radiant Health".

No. 7 Request for enrollment as benefit student, Dinshah Spectro-Chrome Institute.

No. 8 Auxiliary Benefit Notice. Dinshah Spectro-Chrome Institute.

No. 9 Free guidance request. Spectro-Chrome General Advice Chart.

No. 10 Certificate of Benefit Studentship issued to Lewis Ervin Schaeffer, Bath, Pa., dated April 27, 1945, signed Irene Grace Dinshah, Secretary, Dinshah Spectro-Chrome Institute.

No. 11 Constitution and by-laws Dinshah Spectro-Chrome Institute.

No. 12 Pamphlet. Vol. 21, Number 3, Spectro-

Chrome, March 1945 "United States Food and Drug Administration Inspectors Running All Over the Country to Condemn Spectro-Chrome at Forthcoming Trial."

No. 13 Pamphlet "Authentic Report of $250,000 Conflagration" Dinshah Spectro-Chrome Institute, Malaga, N. J.

No. 14 Notice of Planet Meeting Places, Dinshah Spectro-Chrome Institute.

No. 15 Pamphlet in re: Spectro-Chrome Metry Encyclopedia by Col. Dinshah P. Ghadiali, originator, Spectro-Chrome Metry. [14]

No. 16 Pamphlet "Life Sketch of the Originator of Spectro-Chrome Metry".

No. 17 Spectro-Chrome Irradiation. Free Guidance for the Service of Mankind. Dinshah Spectro-Chrome Institute. To Cora E. Wotring, RFD 1, 344 Spruce, Coplay, Pa., May 18, 1945.

Mr. Patterson: As I understand, these are all received in evidence, subject to the Claimant's objection.

The Court: Yes. During the noon recess, if you will show Mr. Goldstein the ones that you think are identical with the ones that his client received, and which have been returned to him. I am sure he will stipulate with you on that.

Do you want to make that stipulation?

Mr. Goldstein: I will stipulate that, subject to

the objection heretofore made as to competency and relevancy.

The Court: That is proper.

Mr. Patterson: At this time the Government rests its case, subject to the right to introduce such testimony as may be necessary to rebut any testimony introduced by the Claimant regarding the seizure, since that question has been raised by the pleadings.

Mr. Goldstein: I now move for dismissal on the ground that the record, as it now stands, clearly indicates that this article or machine was taken from the private home of the claimant in Portland, Oregon, long after the interstate character of the article had ceased and after it became his personal property, the personal property of the Claimant; and the Court has no [15] jurisdiction over a proceeding of this kind, in the absence of any showing that it was transported in Interstate Commerce or being used through the channels of Interstate Commerce; that, as far as an instrument of commerce in interstate trade is concerned, it has long ceased——

The Court: How does the record show that?

Mr. Goldstein: The record shows that by the fact that the stipulation shows that this article was shipped on or about June 14, 1945, to Olsen in Portland, Oregon, and that the article was seized on July 28, 1945, more than a month later, in the home of the Claimant.

The Court: What else does it show?

Mr. Goldstein: That is about all it shows.

The Court: Did he do anything with it?

Mr. Goldstein: No, your Honor. The stipulation specifically states "It is understood and agreed that the Claimant, by the admissions and stipulations herein contained", that is the shipment of the article from New Jersey to Portland, Oregon, "Does not admit that the same are competent, material or relevant herein by reason of the following contentions of the Claimant, which are factually denied by the Government:

"(1) That the Court has no jurisdiction over the subject matter of this proceeding, in that, the device, at the time of its seizure from the home of the claimant, was not then being transported or was in the course of interstate commerce, [16] but that it had passed beyond the interstate commerce channels and was within the private home and in the exclusive possession of the claimant, with no intention of transporting, selling or otherwise disposing of the same, but was acquired, used and intended to be used for the personal use and benefit of the claimant and members of his family, and for no other person or persons, and as so used, in the home of said claimant, it was not labeled within the meaning of the Food, Drug and Cosmetic Act."

The Court: Put the Claimant on the stand and let him prove how he got it, what he is doing with it, and I will hear you again.

WILLIAM RAY OLSEN,

the Claimant herein, was thereupon produced as a witness in his own behalf and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Goldstein:

Q. Mr. Olsen, you are the same William Ray Olsen who is the Claimant to the machine that was seized by the Government? A. Yes.

Q. Where were you living on July 28, 1945?

A. Living at 7425 Southeast Insley Street, at the home of my parents.

Q. I assume that had been your home for some time before July 28, 1945? [17] A. Yes.

Q. Is that the private home of your parents and yourself? A. Yes.

Q. Which is to say, in the City of Portland, Multnomah County, Oregon? A. Right.

Q. Were you on that date in possession of a certain device or machine known as a "Spectro-Chrome"? A. Yes, I was.

Q. How long had you had possession of the machine prior to the time of its seizure?

A. Just approximately a month.

Q. Who, if anybody, was using it in the family?

A. My mother was the only one using it.

Q. Was it used by any other person or persons?

A. No, just my mother only.

Q. Who owned the machine? A. I do.

Q. Did you pay for it?

(Testimony of William Ray Olsen.)

A. Yes, I paid cash.

Q. How much cash did you pay? A. $90.

Q. You had the complete possession of that machine in your private home?

A. Yes, I did. [18]

Q. Was it ever taken outside the home?

A. No, never.

Q. Was it being used for the purposes of resale or reshipment? A. No.

Mr. Patterson: If your Honor please, I object to the intended use of the machine on the grounds it is immaterial and irrelevant, as to the intended use of the machine.

The Court: He may answer, subject to the objection.

Mr. Goldstein: Q. You have already answered that, I think? A. Yes.

Q. Did you answer that question?

The Court: No, he did not answer it.

Mr. Goldstein: Q. Was that machine so purchased and acquired by you and maintained in your private home?

The Court: No. He answered that question "No", I believe.

Mr. Goldstein: Q. Was it intended to be used for any other purpose?

A. No, it was not.

Mr. Patterson: If your Honor please, I move at this time to strike out the witness' answer as to the use that he intended of the machine, for the same reason stated in my previous objection, that

(Testimony of William Ray Olsen.)

it is irrelevant and immaterial as to the intended use.

The Court: The answer may stand, subject to the objection.

Mr. Goldstein: Q. Was it intended to be sold or shipped in commerce at all? [19]

Mr. Patterson: The same objection, your Honor.

The Court: The same ruling.

Mr. Goldstein: Q. Was this machine forcibly taken from you?

Mr. Patterson: The same objection.

A. Yes.

The Court: I think the seizure is an immaterial issue in this case, inasmuch as I have directed the machine to be retuned.

Mr. Goldstein: You may inquire.

Cross Examination

By Mr. Patterson:

Q. You are a member of the Spectro-Chrome Institute, are you not? A. Yes, I am.

Mr. Goldstein: That is all objected to as incompetent, irrelevant and immaterial and not proper cross examination.

The Court: We will see where it leads.

Mr. Patterson: Q. You are a member of the Institute? A. Yes, I am.

Q. What was the entrance fee that you paid to enter the Institute?

A. Well, I joined the Institute.

Q. How much did it cost you to join the Institute?

(Testimony of William Ray Olsen.)

Mr. Goldstein: So that I may not have to object to each question, this is all subject to my objection. May that be understood?

The Court: I understand. [20]

Mr. Goldstein: My objection is that it is incompetent, irrelevant, and not proper cross examination.

The Court: I understand.

Mr. Patterson: Q. How much did you pay to join the Institute?

A. Well, it cost $90 to join, and for the $90 you are given one Spectro-Chrome to become your personal property.

Q. You did not pay anything for the machine, did you?

A. I paid $90 for the machine and I got my membership with it.

Q. Isn't it a fact that you paid $90 to become a member of the Institute and that you got the machine with it?

A. I pay dues of $3 a year for my membership.

Q. That hasn't anything to do with this question. What I wanted to know is: Isn't it a fact that you paid $90 to join the Institute and that the machine was given to you?

A. Yes, I got that all with the $90, membership and machine both came, plus the literature, it all came for $90.

Q. The entrance fee was $90 to join?

A. Well, I wouldn't say it that way. Everything comes to you for $90. You don't pay $90 for

(Testimony of William Ray Olsen.)

the entrance fee and then get the machine as a gift. The machine, the accompanying literature and the membership is all for $90.

Q. Who is privileged to use the machine?

A. Just members—just myself and members of my family only. No one outside the family has ever used the machine, and it is against the rules and regulations, which I signed, to use it [21] outside our home.

Q. What do the rules say as to who can use it?

A. The rules say this, that only members of my immediate—members in the home where I reside can use the machine. Other people, like relatives, who reside elsewhere cannot use the machine, so that limits the use of this Spectro-Chrome to myself, my two brothers, my mother and my father and no one else.

Q. If there were other relatives living in the home, would they be included, or not.

A. They could not use the machine, no.

Q. Do you know what the rules say as to the relationships that can use the machine?

A. Well, there is a rule in there about blood relationship. That has something to do with it. But I myself am not going to allow anyone outside of my mother and father and my two brothers to use the machine. I have adhered to that rule and I am going to continue by it.

Q. Have you had an opportunity to examine Government's Exhibit No. 1?

A. No, I have not.

(Testimony of William Ray Olsen.)

Q. I wonder if you would step down, with the Court's permission, and look at that?

A. Yes.

Q. Is Government's Exhibit 1 substantially identical with the machine that was taken from your place? [22]

A. Yes, it is. It is identical, to the best of my ability.

Q. How was the machine received at your home?

A. The machine was received at my home, delivered by the Railway Express Agency. I answered the door and he left the machine on the porch. I signed my name to a receipt which the delivery agent required and he said "From now on, it is yours." I said "Well, I will take it from the front porch," and I took it into my home.

Q. Do you know where the machine came from?

A. Yes.

Q. Where did it come from?

A. It came from the Dinshah Spectro-Chrome Institute in Malaga, New Jersey.

Mr. Patterson: That is all.

Redirect Examination

By Mr. Goldstein:

Q. Was this machine, after it had arrived in your home and had been held by you and so forth, ever held by you for sale?

A. No; I never intended to sell it.

Mr. Patterson: Just a moment. The Government wishes to object as to any purpose or any

(Testimony of William Ray Olsen.)

intended uses that the Claimant might want to put the machine to after he had received it.

The Court: The record may show the Government has objected to that question. Let him answer. The answer may be permitted, subject to the Government's objection. [23]

Mr. Goldstein: Q. From the time you received the machine and during all the time thereafter, and up to the time of its seizure by the Government, was this machine ever held by you or intended to be held by you for sale? A. No.

Mr. Patterson: If your Honor please, the Government moves to strike that answer on the same ground.

The Court: The answer may stand, subject to the objection.

Mr. Goldstein: Q. One further question: Were you perfectly satisfied with the machine?

A. Yes.

Mr. Patterson: The same objection.

A. I am perfectly satisfied.

Mr. Goldstein: Q. Were you perfectly satisfied with the machine for the purposes for which you purchased it?

The Court: Wait a minute. Do you want to make an objection?

Mr. Patterson: What is the question?

(Question read.)

Mr. Patterson: The Government objects to that question on the ground that it goes to the merits of the case, which have already been stipulated, and

(Testimony of William Ray Olsen.)

also on the ground it is incompetent, irrelevant and immaterial whether the claimant was satisfied with the machine as he purchased it for his intended use.

The Court: You may answer, subject to the objection.

Mr. Goldstein: Q. You may answer. [24]

A. Yes, I am perfectly satisfied with the machine.

Mr. Patterson: The Government also moves to strike out the answer.

The Court: The answer may stand, subject to the motion and the objection.

Mr. Goldstein: That is all.

The Court: How old are you?

A. I am 23.

Q. Where were you born?

A. Born and raised at 7425 Southeast Insley Street, Portland, Oregon.

Q. And that is your present address?

A. Yes, it is.

Q. What education have you had?

A. Graduate of the Marysville School, then I went to Benson Tech. and graduated there.

Q. Benson Polytechnic in this city?

A. Yes.

Q. What year did you graduate there?

A. June, 1941.

Q. What did you study there?

A. I studied gasoline engines, cars, then I also took up science and chemistry and physics and

(Testimony of William Ray Olsen.)

things of that sort that are similar to Spectro-Chrome Metry.

Q. It was in 1941 that you graduated from there? [25] A. Yes.

Q. You were how old, then? You were 17 or 18?

A. 17 or 18. I don't remember exactly.

Q. What did you do after that?

A. I worked at the Columbia Aircraft Industries during the war.

Q. In this city? A. Yes.

Q. What did you do there?

A. Well, I was an aircraft mechanic.

Q. Just a little bit about what you did there?

A. We worked on the naval bombers and so forth. It was my job to make parts and finish them according to the specifications of the company. I was classified as an aircraft fabrication worker.

Q. About what did you make there?

A. Well, I did forming and shaping——

Q. What were your wages, about?

A. I started in at 60 cents an hour and I was raised to $1.25 just before the war ended.

Q. You were not in the Army or Navy?

A. No, I was not.

Q. You did not go on to college after finishing Benson Tech.? A. No, I didn't.

Q. Was that for financial reasons?

A. Yes. [26]

Q. You are not married? A. No.

Q. You have always lived with your mother and father at your present address?

(Testimony of William Ray Olsen.)

A. That is right.

Q. How old are your parents?

A. One of them is 53 and the other is, I think, about 55, approximately.

Q. Is your father in business?

A. No. He is an employee of the Inman-Poulsen Lumber Company.

Q. What does he do there?

A. He is a carrier driver.

Q. Driver?

A. Yes, drives a lumber carriage.

Q. Oh, yes. Do you know what schooling your parents have had?

A. They have had grade school, but I don't think they have ever had high school.

Q. When did they come to Portland?

A. Around in 19——I don't know. What was the time of the first World War? I don't remember.

Q. You have brothers and sisters?

A. I have two brothers.

Q. Do they live at home?

A. Yes, they both live at home.

Q. How old are they? [27]

A. One is 21, I believe, and the other is 24.

Q. Do they have high school educations?

A. Yes. My youngest brother graduated from Benson and the oldest one graduated from Commerce.

Q. Commerce is another high school?

A. Yes, that is right.

(Testimony of William Ray Olsen.)

Q. Have you used this instrument for any illness of your own? A. Yes, I have.

Q. What results did you get, in your opinion?

A. The first thing I did—I had warts on my hand and I used the Spectro-Chrome and it cleared them up in a remarkably short time. I had stomach disorders and that cleaned it up in a very remarkable short time.

Q. For what ailment did your mother use the machine?

Mr. Patterson: If your Honor please, I think the testimony of the witness would be incompetent as to any disability or ailment that his mother was suffering from.

The Court: He may answer, subject to the objection.

A. She was using it for nervous disorders. Before she used it, she was under the care of a medical doctor, and he confessed to me——

Mr. Patterson: If your Honor please——

A. ——and my mother that he couldn't do any good.

Mr. Patterson: I object to that as hearsay as to anything that the doctor said that she was suffering from. [28]

The Court: He may continue.

A. The doctor couldn't do anything for her. He said there was nothing he could do, so I paid him up and we purchased the Spectro-Chrome and I began to give her these Spectro-Chrome treatments

(Testimony of William Ray Olsen.)

according to instructions and she began to get better.

Mr. Patterson: I object to that as calling for a conclusion of the witness, being a conclusion of the witness.

The Court: He may continue.

Mr. Patterson: He is not competent to testify as to whether or not she was getting better or not.

The Court: He may continue, subject to the objection.

A. She began to get better and to improve. Then, the Government came into our home and seized the machine against my will.

The Court: You don't need to go into that.

A. She was denied the use of the machine.

The Court: You don't need to go into that. Is she still using it?

A. Yes, she is, now that it has been returned she is using it.

The Court: You may cross examine, if you wish.

Recross Examination

By Mr. Patterson:

Q. Do you have any physical disabilities?

A. Yes, I have one.

Q. State that, please. [29]

A. My right leg is stiff.

Q. What was that the result of?

A. That was the result of an accident at the age of four.

Q. What kind of an accident?

(Testimony of William Ray Olsen.)

A. I fell down on the sidewalk and had a severe bump, and the medical doctors have never been able to give it a diagnosis, so I don't know what is wrong.

Mr. Patterson: As to what the medical doctors say, I object to that as not responsive to my question and I move that it be stricken.

The Court: It may stand, subject to the objection.

Mr. Patterson: Q. Is your leg still stiff?

A. Yes, it is.

Q. Have you used the Spectro-Chrome on it?

A. No, I have not.

Mr. Patterson: That is all.

Mr. Goldstein: That is all.

(Witness excused.)

Mr. Goldstein: The Claimant rests.

The Court: Any rebuttal?

Mr. Patterson: No rebuttal, your Honor.

The Court: The case is submitted. I will render a decision on it today or tomorrow. Court is now in recess.

(Thereupon the proceedings had in the above-entitled cause on, to-wit, May 21, 1946, were concluded.) [30]

[Title of District Court and Cause.]

CERTIFICATE

I, Ira G. Holcomb, hereby certify that on Tuesday, May 21, 1946, I reported in shorthand certain testimony and proceedings had on the trial of the above-entitled cause, that I subsequently caused my shorthand notes to be reduced to typewriting, and that the foregoing transcript, consisting of 30 pages, numbered 1 to 30, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said date as aforesaid, and of the whole thereof.

Dated this 14th day of June, A.D. 1946.

/s/ IRA G. HOLCOMB,
Court Reporter. [31]

Title of District Court and Cause.]

TRANSCRIPT OF HEARINGS ON FINDINGS OF FACT AND CONCLUSIONS OF LAW

Portland, Oregon, Tuesday, June 25, 1946

10:27 o'clock a.m.

The Court: It is your own motion. You want to be heard [1*] on the findings.

Mr. Patterson: These are my findings, your Honor. So far as I am concerned, they seem to be in conformity with your Honor's opinion. If counsel for the defendant has some additional ones he wants in, I don't know about them.

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* Page numbering appearing at top of page of original certified Transcript of Record.

The Court: You sent word you wanted to be heard about Finding No. 4.

Mr. Patterson: Yes, I wanted findings entered. I haven't been served with any and I proposed some. If the Court feels these are sufficient or proper I am perfectly satisfied with these. If he has some others in mind I would like to see those before they are entered.

Mr. Goldstein: If the Court please, I submitted, immediately upon the receipt of the opinion, written opinion of the Court, which has been filed as part of the record, a judgment, in which I referred to the opinion in this language: "and after due deliberation thereon the Court files its findings and decision in writing and orders that judgment be entered herein in accordance therewith in favor of Claimant."

And consequently I proceeded as follows: "It is hereby decreed that the petition for condemnation be denied and that the article be returned to the Claimant, and that the Claimant have judgment dismissing the libel."

I was under the assumption all of this time the judgment had been signed and the matter closed. Only a few [2] days ago I was informed that the judgment had not yet been signed and that Mr. Patterson was insistent on having special findings.

The Court: I am listening.

Mr. Goldstein: I was not aware that it was compulsory to have findings, and if there are findings I would like to have the privilege of preparing them and to have the Government interpose any objec-

tion thereto he might see fit, and only just a few moments ago have I for the first time seen the proposed findings submitted by the Government. I do not like the wording of the Government in respect to the findings, as gathered from your Honor's opinion, and I would like to formulate and frame the wording that I think would be more suitable to that, in view of the situation, but I do think, however, it might be to the interest of both of us if there may be some clarification by the Court as to exactly what specific findings the Court desires to make, and if my judgment order is adequate and sufficient, that there be no necessity for making specific findings. But if the Court wants specific findings presented I think the Court might assist me somewhat in informing me just what particular findings the Court desires me to submit. Otherwise I would submit my own views of the situation and then counsel could, with propriety, object to them and submit his own. But, as I stated, I do object to the findings as submitted by the Government at this time. [3] I have only had two minutes to read them over, but I have seen enough of them to be of the opinion that the language used is not the type of language that I think the Court ought to sign because it is not an exact finding, as I view it. But if the Court wants to take the time at this time to discuss the situation I am perfectly prepared to discuss it.

May I inquire, if the Court please, is there a specific rule? I admit some ignorance about the

situation that compels or requires findings to be submitted.

The Court: Yes, in all non-jury cases that are subject to the rule. I don't know whether this case is subject to the rule or not.

Mr. Patterson: I looked into it somewhat, your Honor. From my search I came to the conclusion the Court is not required to. It is within his discretion whether or not to sign findings.

The Court: There is so much stress placed on findings these days that I just assumed, as a matter of course, that findings would be in order. Let's see if there is any great difference between us. You have a copy of your designations before you?

Mr. Goldstein: Just handed to me a moment ago.

The Court: You keep repeating that, like you attach some importance to it.

Mr. Goldstein: Yes, I do, because I do like to reflect a [4] little on findings.

The Court: Who is rushing you?

Mr. Goldstein: I am not criticizing. The only thing is, I think usually the prevailing party is the one that submits the findings, and this is a novel experience to me, to have findings presented by the losing party.

The Court: Don't you notice you learn something every day from the younger men in the profession? Keep on your toes. They have me standing on my head half of the time. Also, some of the older ones. Here Mr. Patterson has No. 1, "That this Court has jurisdiction of the article of device

labeled in part 'Spectro-Chrome' and accompanying labeling and that it is within the jurisdiction of this Court."

Mr. Goldstein: We object to that because that is one of our serious contentions. I think the Court has no jurisdiction over the subject matter, and there he submits a finding that is contrary to all of our contentions and I think the Court in its opinion came to that conclusion.

The Court: Then the decree would be dismissal for want of jurisdiction?

Mr. Goldstein: Yes. But there is no necessity for making any finding as to that at all.

The Court: And you might explain your position a little further about that.

Mr. Goldstein: Well, it is our contention that the Court [5] has no jurisdiction over the subject matter because it had passed the interstate commerce stage. It was in his private home. It was his own property and the Government had no more right to come in and take jurisdiction over something that I think Congress never contemplated that it should have, although it is true that the decree might find that the Court had general jurisdiction in addition to the other findings of fact. Had your Honor been of the opinion that an easy way of disposing of the case would be to hold that it had no jurisdiction whatsoever, it would have warranted the question of the Government's power of condemnation under the circumstances in this case and the Constitutional questions as to transportation, and, therefore, I would prefer to have the Court

make findings on those questions which I regard as true issues in the case.

I think the conclusion to be drawn from the language suggested by me is that the Court has no jurisdiction over the subject matter because of the view that I take as to the finding that the interstate transportation had ceased when it came into the hands of the purchaser, and also as to the finding challenging the right to invade one's private home against his will and removing his property without due process of law.

But in the final analysis, as I view it, the Court had no jurisdiction over this particular matter, so when your Honor finds that it did I am fearful that it might run counter [6] to your Honor's opinion and ultimate conclusion.

If I may be permitted to make this suggestion, if the Court wants findings I would be glad to submit the findings as I view them in accordance with and in the light of the Court's viewpoint all through the proceedings, and serve them upon counsel and bring them here next Monday.

The Court: I won't be here next Monday.

Mr. Goldstein: Well, two weeks from next Monday.

The Court: I won't be here two weeks from next Monday. I am not sure what I want. I am very interested in what you are saying, very much interested. Jurisdiction is a tricky field to me.

Mr. Goldstein: And not only that, I would hesitate to have the Court bind its hands here and have the Appellate Court say the Court finds certain

things, placing its approval of doing something that we had no right to.

The Court: Well now, what is there?

Mr. Goldstein: No. 2 is all right. There is no objection to that, of course, because that is perfectly agreeable, "That this action is brought by way of libel of information."

No. 3 is all right because it is in line with our stipulation.

No. 4 is all right because it is in line with our stipulation.

But before we proceed with No. 5 I think we ought [7] to have a finding in accordance with the facts in the case, that the initial process was issued; not only that affidavit of one who had knowledge of the facts, but it was upon the affidavit of Mr. Patterson, who had no knowledge of the situation, and that the order would not justify, as I view it, the invasion of the home against his will, and also that the entry was illegal.

I would like to have language in there that would protect us in our contention which might be considered by the appellate court as to the circumstances under which the Government, with the writ of attachment—that is what it amounts to—may come and, against the will of a party, the possessor of the article, take personal property away from him by invading his home. He can't do that. In the civil courts here a writ of attachment is issued for personal property. The Sheriff can only seize it when it can be done without the invasion of Constitutional rights and safeguards. And he certainly

would not dare to go into your home and seize your piano under attachment. You could under execution, but this is merely an attachment. And I contend this order was not issued on the affidavit of a party who has any personal knowledge of the facts. Certainly you would not have a right to go into a private home and seize it against his will and without his consent and make an illegal entry in order to do that. I think that ought to be set forth in language [8] plain and clear enough so the appellate court might be in a position to pass on the important question that involves the rights of our citizens all throughout the United States.

It is a very important issue and I think it should be set up in proper language, so that the Court can pass on it.

And then No. 6, I have no objection to that, because, although to me that is argumentative because it could be all put in one finding setting out the subject matter of your opinion, that it was not inherently dangerous and that it was received after the interstate commerce had stopped; that it was bought by him for his personal use and for members of his family; that he did not intend to sell it or use it for commercial purposes, and did not intend to use it in interstate commerce. And I think a finding should be clear and specific upon that ground so the appellate court can readily recognize the issues that they had to pass upon. In other words, we would like to choose the language.

Mr. Patterson: If your Honor please, claimant's counsel refers to the issuance of process. I don't have any objection to putting in the findings

how the process was issued, but when the claimant's counsel refers to the facts that led up to the seizure I believe the Court directed at the time of the trial that no testimony would be taken on that issue, so I don't want anything in the findings about that because the Court [9] directed no testimony be taken on that issue.

Now when counsel refers to the rights of citizens being invaded, I want to show and have in the findings just exactly which rights were invaded and which Constitutional provisions were taken advantage of or were not, such as I have put in Paragraph 5 of the findings, that they were contrary to the Fourth Amendment. We have talked about this in pre-trial conference and on motion before the trial, about the citizens being invaded in the private home, and I want to know what rights they were, whether Fourth or Fifth Amendment or what it was, because we can talk about private citizen's rights being invaded but unless we get right down to the point, which rights were invaded and which rights were guaranteed to the citizen, the appellate court will not know any more about it than I think we have known ever since this trial started about which rights were invaded. Which rights were they? Were they the rights of the Fourth or Fifth Amendment, or what were they? From your Honor's opinion I gathered the rights you referred to being invaded, going into the home, were those guaranteed by the Fourth Amendment. If there were others I have no objection to putting those in, but I do want to know just exactly what the de-

fendant refers to when he says his rights were invaded when they went into his private home and took this machine.

The Court: Mr. Goldstein, you made a remark about execution. Is there a statute in Oregon permitting the execution [10] to be levied in a dwelling against the consent of the owner? There are in some states, I notice.

Mr. Patterson: One other thing: Your Honor, counsel mentions about the lack of jurisdiction by the Court. If the Court feels that is part of the findings I would have no objection to that being part of them and going up on that question, that the Court has no jurisdiction for the reason that the article passed out of interstate commerce and the interstate commerce phase of the device had ended. I would have no objection to that going in, if that is the Court's finding, and the Court to base the judgment on that fact, or partly on that fact.

The Court: You had an idea that you advanced at the trial, Mr. Patterson—I am not sure that you carried it forward in these findings that you submitted—that the seizure had to be unbroken throughout the trial to maintain the jurisdiction of the Court.

Mr. Patterson: Yes, your Honor. That is one of the reasons that I have Paragraph 1 in the findings. Your Honor stated at the time you returned the machine that it was not passing out of the jurisdiction of the Court and the Government would have its rights of appeal and the Court would protect it. I think one of the necessities on appeal is

the jurisdiction of the res, and when the judgment is ordered I have also prepared a motion moving the Court for an order setting that portion of [11] the judgment aside which refers to the return of the article to the plaintiff pending the appeal.

The Court: You have that clause in your form of judgment, Mr. Goldstein, but your client has the article now. It does not need to be returned.

Mr. Goldstein: I didn't quite follow your Honor.

The Court: I say, you have a clause in your form of judgment that the article be returned and restored to the claimant, but he has it now.

Mr. Goldstein: The reason I did that was because I had previously presented an order after your Honor had directed its return, which order had not been signed, so I wanted some formal record directing its return. If the Court feels that is not necessary in there, I have no objection to it being removed, but there wasn't any order signed and I had prepared one.

Mr. Patterson: I think that it is necessary, your Honor, for the reason that your Honor implied in the transcript there. The Court said that the article was not passing out of the jurisdiction of the Court.

The Court: Well, I meant by that it was in the State of Oregon.

Mr. Patterson: Well, I think it would still have to be under the jurisdiction of the Court in order that it could be proceeded against. [12]

The Court: Well, how?

Mr. Patterson: If the Court absolutely uncon-

ditionally releases the res as being proceeded against, I think I am compelled to say that the Court lacks jurisdiction to go any further.

The Court: Well, that is what I though was your decision.

Mr. Patterson: So that in order to protect our rights of appeal I may say that I wanted in the judgment that the article be returned, so it will show the Court still had jurisdiction at the time we had the trial. If the Court felt that the Court didn't have jurisdiction if the article was returned, I think the Court should have informed us and under Mr. Goldstein's motion at the time of the trial we would not have needed to have any trial; the case would have been dismissed cold.

The Court: You have just talked yourself around the barn. I have never said anything that indicated that I thought the Court had lost jurisdiction.

Mr. Goldstein: I have never made such a claim.

The Court: You indicated in the brief purposes of argument had occurred but did not credit that to me. That was your idea. I will tell you now what my idea about that is, after having had that opportunity for reflection. It is the same as my ideas confirming the impression I had about it, that the situation is comparable to the ordinary situation [13] in admiralty where it was not deemed necessary that continuity of seizure be maintained. The common practice in admiralty is to permit possession to be resumed by the libelee to the giving of bond, or even on his own recognizance, and it has

never been thought that that defeated the possession of the admiralty court in forfeiture proceedings, and I admit the cases talking about seizure, giving jurisdiction to forfeiture proceedings, but I just don't think that means continuity of seizure must be maintained unbroken. It is a field that I hesitate to venture into. There is no field more difficult to me than the jurisdiction field. It is one that is easy to talk on but with lots of falls in it.

We have been talking here this morning about two separate jurisdictional questions. The one we are talking about right now, and that you are interested in, Mr. Patterson, has to do with continuity of the seizure. The one Mr. Goldstein is talking about grows out of the ending, as he views it, of the movement in interstate commerce. Those are different questions, and I want to make sure that they are kept definitely in my mind.

I agree with your logic, Mr. Patterson, if when I sent the thing back to the man to use that ended the case, why, I agree with you that we should not have done any more, and there never would have been any trial on the merits then. But I don't think it had that effect any more than releasing [14] a ship on a bond, or releasing anything else in a libel in admiralty. So I just think it will make unnecessary trouble for whoever touches the case later to talk about restoring possession to a man, or returning it to him, if it was done in an early stage of the case. So far as Oregon is concerned, our minute made at the time of serving the order—we don't have the minute proceeding, or we don't em-

ploy it nearly as completely as they do in other District Courts, the reason being largely I think our necessities are not so great for them. In a city like Los Angeles the courts could not run if they had to wait for lawyers to bring in a formal written order—too many lawyers, too many cases, too many judges; and I think it is safe in saying nine out of ten things they do in the courts there the only record that is made of them is what the clerk makes, and it occurred to me that in this case that would be sufficient. This is the kind of case we read about difference of opinion, there are so many questions in it. Every time a man opens his mouth and turns around he raises a question. I wanted to keep as few questions in it as I could.

I don't know right now, Mr. Goldstein, whether the form of the judgment, just thinking of your proposition about the interstate commerce question in the case, should be a dismissal for want of jurisdiction. Just the other day the Supreme Court had this before it. Judge Jenney, whom Judge Fee [15] and I knew very well and who I thought was a very able man—he is dead now—in Los Angeles, had a complaint before him about some members of a religious sect down there that got into difficulties with the Federal Government and they were being prosecuted criminally, so I suppose as a counter measure—I don't know about that for sure—they filed a civil action in the Federal Court in Los Angeles against the F.B.I. agents who had raided the premises and they grounded it on one of the Federal Constitutional amendments. They

claimed the Court had jurisdiction because of the question. They claimed they were making arrest under the Constitution of the United States.

Judge Jenney dismissed the complaint and said, "This is no different than any other claim of damages for trespass. If these officers went beyond their legitimate spheres on the premises of the defendants they are liable for trespass the same as anybody else," and relegated them to the State Court for their action. He said, "They have no claim arising under the Constitution of the United States and, therefore, this Court has no jurisdiction," and he dismissed it for want of jurisdiction. The Ninth Circut affirmed it. In a divided opinion the other day—Justice Black wrote the majority opinion; Chief Justice Stone was still alive and he wrote the dissenting, one or more, and the majority reversed that holding and said—now listen to this—said, "The Court [16] should have retained jurisdiction and tried the case to find out if it had jurisdiction. Only by going into the merits could it find out whether it had jurisdiction."

Now these plaintiffs might or might not have had a claim arising under the amendments depending on what the fact issues are.

Well, I have difficulty with a question like that. That is hard for me to say, that you should try a case on the merits to find out if you had jurisdiction, it following, of course, that if at the end you find you haven't jurisdiction you dismiss it for want of jurisdiction. That would seem to follow. But if you dismiss it on the merits that would be

adjudication. If you dismiss it for want of jurisdicton and you go over in the State Court where the statute had not run you could bring it over there and be heard on it. So here we tried the case and, what I would consider, tried it on the merits and you have brought me up here in form a dismissal of that. You say "with prejudice" here at the end, your closing words, but you tell me now that the facts which were disclosed at the trial, namely, that the interstate journey of this article was completely ended, was in the hands of the private owner, the ultimate consumer, and those facts at the trial on the merits show that the Court didn't have jurisdiction of the subject matter; that it wasn't the kind of a thing that could be seized. That sounds kind of like the Los Angeles [17] case.

Mr. Goldstein: Well, if I may be permitted, your Honor, I think to a large extent your Honor is correct but the situation factually is a little different.

The Court: I am neither correct nor incorrect. I am confused.

Mr. Goldstein: Well, I don't think there is any occasion for confusion, in my opinion, because—I may be wrong about it, but to me it is rather simple, for this reason: Because when we talk about the lack of jurisdiction I don't mean by that the Government had no right to bring this type of an action. In that case you commented upon the question arose whether or not they would have the right to bring that action and the Supreme Court apparently held they could not. They could not deter-

mine that until they went into the merits to find out; then the merits would show whether they had a right to initiate that action.

In this case we all concede the Government had a right to bring this libel proceeding, but I contend if the facts are presented they disclose upon the merits they did not come within the provisions of the law upon which this complaint is founded. In other words, in order to maintain their cause of action against the defendant they have got to show this article was mislabeled, which they have proved, but they have also got to prove that it was engaged in interstate [18] commerce. They established the first premise and failed on the second premise. Failing in that second premise, then upon the merits they were unable to establish the case upon the merits because the facts disclosed that they had no jurisdiction to proceed. They could not prove that second jurisdictional point. They were able to establish the first jurisdictional point to come into the Federal Court, and they failed on the second one, and in that, just like you bring an action in the Circuit Court—you bring an action for a guest, you have got to prove gross negligence. You prove ordinary negligence but you are bringing it upon the gross negligence and the Court dismisses it because the Court finds it has no jurisdiction to submit it to the jury upon the merits because there was no evidence establishing that within the framework of that statute, and that is what I mean by that.

I hope I make myself clear.

The Court: Well, I must say to you that is a misuse of the term "jurisdiction."

Mr. Goldstein: Maybe I misused the term.

The Court: The one you are making now. You make it easier, I think——

Mr. Goldstein: I don't know that I misused the term, but the only thing is, if you say the Court has jurisdiction of the article of device, that would be upon the premise, as I [19] view it, that the Government was able to establish that the article was within the confines of interstate commerce and that the interstate commerce had not ceased, and I don't want to be placed in the position where the Circuit Court of Appeals or the Supreme Court could say, "Why, we have got to reverse the case because it is admitted the Court has jurisdiction over the article and, therefore, having jurisdiction over the article, and they admit the article was mislabeled, that is an end to the case." I don't want to place myself in that jeopardy.

The Court: We start all findings in this practice in non-jury cases stating we had jurisdiction and you waived it.

Mr. Goldstein: Well, over the cause of the suit that would be all right—over the libel proceeding. If the Court feels that is necessary it might be stated that this action is brought by way of libel of information against the device labeled "Spectro-Chrome" and accompanying labeling, which action is subject to jurisdiction of the Federal Court. In other words, make it clear you are not making a specific finding about something in the end you find the Government failed to establish its jurisdictional question. I am using the word "jurisdictional"

again, because to me that is important. They would have no right to come into this court at all unless they would establish those two premises and they can't establish them. [20]

Mr. Patterson: Mr. Goldstein refers to a lack of jurisdiction for the reason or reasons based on interstate shipment. I have no objection to the case being decided on that, if it is his desire—no objection at all. However, the statute provides the article may be proceeded against while in interstate commerce or at any time thereafter. Should the Court find Congress exceeded its power I have no objection to decision on that ground.

One other situation, though, I would like to discuss, and I would like the Court to state a position on his theory when he referred to the article of device labeled "Spectro-Chrome," and if the Court had in mind at the time he directed the return of the article it would be a return similar to a return on bond or return on personal cognizance I don't have any objection to that, either. That is all right. I concur in the Court's opinion, that the Court still had jurisdiction, if that is the type of return made. I just wanted to be sure it wasn't an unconditional return. If the Court directed it be returned on bond or on cognizance I also believe the Court had jurisdiction and I would have no objection to that. I would like the Court to state in the record that is the type of return he had in mind when he directed return to the claimant.

Mr. Goldstein: If the Court please, I may be making myself a lot of trouble. The testimony is

complete. The testimony [21] is taken, with the stipulation and evidence that is part of the record. The Court has filed its written opinion, which is in the nature of a finding. I don't think we need any more—just merely a judgment dismissing the libel, and any specific findings I think would be surplus, because we went into the whole subject pretty thoroughly, but of course I will submit them.

Mr. Patterson: Let me say this, your Honor. There is an indication there is necessity of findings here because of the total lack of agreement on our part to prepare findings in accordance with the Court's opinion. Mr. Goldstein, when the opinion was rendered, said he would not prepare findings. He didn't believe he could prepare findings. And I have prepared some that we are not in agreement on, and I did state that in all probability this case would be appealed, and I think in order to get the precise points the case was decided on at issue, so we will know what we are talking about in the appellate court, I think it is necessary we do reach some agreement on the findings that should be entered.

The Court: Well, my only interest in findings is to discharge whatever my further duty is in the case. Our Circuit often comments that findings ought to be made necessary. I think that is what I will inquire about first, as to whether findings are required or usual in this type of case—required or usual; and it may be that I will ask you to give me your [22] ideas as to findings, or I may not.

I am glad we had this talk. This falls in on the

record. I don't think whoever looks at the case will need be in any doubt about what the issues were here and what was decided.

Mr. Patterson: May I say one thing more in relation to the provision in the judgment which refers to the diversion of the article? Isn't it a fact if the article is returned on the claimant's personal cognizance that it is usual in the judgment to exonerate his cognizance and direct that the machine be returned? I think there should be some provision in that that would refer to the fact and show that the Court intended that it be returned——

Mr. Goldstein: Similar to on a bond?

Mr. Patterson: ——to show that these provisions are required, have been complied with and that the article is now returned to the claimant?

Mr. Goldstein: I never challenged the fact that the machine is in the home, or not in the Marshal's office: no claim that it is.

The Court: I know you didn't. They are through.

Mr. Patterson: There might be a claim.

Mr. Goldstein: There surely will not be, so far as I am concerned, if I have anything to do with it, but if it makes him feel any better it could be said "Pending the trial of [23] the case the machine was ordered returned to his home." I don't know whether it is necessary but I would have no objection to that, to make him feel easier.

The Court: All right, gentlemen.

(Thereupon, Court was adjourned.) [24]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand all of the oral proceedings had in the argument before the Court, the Honorable Claude McColloch, Judge, presiding, on Tuesday, June 25, 1946; that I subsequently prepared a transcript of said argument from my shorthand notes, and the foregoing transcript, pages numbered 1 to 24, both inclusive, contains a full, true and correct record of all of the argument and discussion had before the Court on said date, so reported by me in shorthand, as aforesaid.

Dated at Portland, Oregon, this 23rd day of August, A.D. 1946.

/s/ ALVA W. PERSON,
Official Court Reporter. [24]

[Endorsed]: No. 11403. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. William Ray Olsen, Claimant of One Article of device labeled in part "Spectro-Chrome", Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed October 24, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11403

UNITED STATES OF AMERICA,
Libelant-Appellant,

vs.

One article of device labeled in part "SPECTRO-CHROME" and accompanying labeling;
WILLIAM R. OLSEN,
Claimant-Appellee.

STATEMENT OF POINTS ON APPEAL

The Libelant-Appellant respectfully submits the following Statement of Points, upon which Libelant-Appellant intends to rely on appeal:

I.

The District Court erred in holding that the Libelant-Appellant was not entitled to an Order or Writ of the Court directing the seizure of the device and accompanying labeling from the Claimant-Appellee's dwelling.

II.

The District Court erred in finding that the Claimant-Appellee did not consent to the entry into his home for any purposes connected with this case.

III.

The District Court erred in holding that the machine and accompanying labeling had passed

beyond Interstate Commerce channels, and that, therefore, no interstate transportation was or had been, at any time, involved in this case.

IV.

The District Court erred in holding that the Claimant-Appellee was entitled to Judgment dismissing the Libel and adjudging and confirming the return of the article of device and accompanying labeling.

V.

The District Court erred in not entering a Decree of Condemnation against the article of device and accompanying labeling and ordering the device and accompanying labeling disposed of pursuant to 21 U.S.C. 334.

HENRY L. HESS,
United States Attorney for
the District of Oregon.

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Statement of Points on Appeal on the Claimant-Appellee herein, by depositing in the United States Post Office at Portland, Oregon, on the 30th day of October, 1946, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Barnett H. Goldstein, Attorney at

Law, Failing Building, Portland, Oregon, Attorney for Claimant-Appellee.

J. ROBERT PATTERSON,
Assistant United States
Attorney.

[Endorsed]: Filed Oct. 31, 1946.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Libelant-Appellant respectfully designates for printing the whole and entire record as particularly itemized in Appellant's Designation of Record to the District Court to be forwarded to the United States Circuit Court of Appeals, Ninth Circuit, it being the Appellant's intention to designate the whole and entire record on appeal, namely:

1. Libel of Information.
2. Order of July 26, 1945, allowing Libel to be filed.
3. Order of July 26, 1945, directing that process issue and directing publication.
4. Warrant of seizure and monition.
5. Marshal's return of service of the writ.
6. Affidavit of publication.
7. Appearance and answer of Claimant.
8. Motion to make scientific examination of slides.

9. Motion for Order directing Claimant to file stipulation for costs.

10. Order of March 11, 1946, reserving decision on Libelant's Motion.

11. Memorandum Opinion of Judge McColloch dated April 4, 1946.

12. Order of April 4, 1946, denying Libelant's Motion to detach glass slides.

13. Order setting case for trial.

14. Claimant's Motion to Quash warrant, restore seized article to Claimant, and to dismiss Libel.

15. Affidavit of William R. Olsen, Claimant.

16. Libelant's Motion for Summary Judgment.

17. Order dated April 29, 1946, directing seized articles to be restored to Claimant.

18. Affidavit of William Rickard, Deputy Marshal, and Affidavit of David J. Holliday.

19. Petition for Order directing Claimant to produce the seized device and accompanying labeling.

20. Application for Pre-Trial Conference.

21. Stipulation between Libelant and Claimant.

22. Order denying Motions dated May 21, 1946.

23. Judge McColloch's Opinion dated May 22, 1946.

24. Libelant's Objections to proposed Findings of Fact and Conclusions of Law.

25. Suggested changes in the Findings of Fact and Conclusions of Law.

26. Findings of Fact and Conclusions of Law.

27. Judgment.

28. Notice of Appeal.

29. Order of Circuit Court of Appeals for the Ninth Circuit dated August 9, 1946, staying return of device to Claimant.

30. Order extending time to docket the appeal and file transcript on appeal.

31. Order directing Clerk to forward exhibits.

32. Transcript of Pre-Trial proceedings.

33. Transcript of trial proceedings.

34. Transcript of hearings on Findings of Fact and Conclusions of Law.

35. Designation of Record (D.C.).

36. Designation of Record to be Printed (C.C.A.).

Dated at Portland, Oregon, this 11th day of October, 1946.

HENRY L. HESS,
United States Attorney for
the District of Oregon.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Designation of Record on the Claimant-Appellee herein, by depositing in the United States Post Office at Portland, Oregon, on the 11th day of October, 1946, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Barnett H. Goldstein, Attorney at Law, Failing Building, Portland, Oregon, Attorney for Claimant-Appellee.

/s/ J. ROBERT PATTERSON,
Assistant United States Attorney.

[Endorsed]: Filed Oct. 15, 1946.

At a Stated Term, to wit: The October Term 1945, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday, the ninth day of August, in the year of our Lord one thousand nine hundred and forty-six.

Present:

Honorable Francis A. Garrecht,
Senior Circuit Judge, Presiding;

Honorable William Healy, Circuit Judge;

Honorable William E. Orr, Circuit Judge.

[Title of Cause.]

ORDER STAYING PORTION OF JUDGMENT OF DISTRICT COURT PENDING APPEAL

Upon consideration of the petition of the United States of America, for an order staying a portion of the judgment entered in this cause by the District Court of the United States for the District of Oregon on August 1, 1946, pending determination of the appeal herein heretofore taken by the appellant, and good cause therefor appearing,

It Is Ordered that the portion of the said judgment of the said District Court in the following words:

> 'It is hereby further ordered and adjudged that return of the said article of device labeled

in part 'Spectro-Chrome' and accompanying labeling to the Claimant herein, William R. Olsen, is adjudged and confirmed."

be, and hereby is stayed pending the disposition of the appeal herein.